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[illegible] COURT OF THE UNITED STATES

NUMBER 310

[illegible] ELECTRIC AND GAS COMPANY, A COR[illegible], Petitioner,

v.

[illegible] L. MATTSON, ADMINISTRATOR OF THE [illegible] OF WILLIAM BREHM, DECEASED, AND [illegible] SCHOOL DISTRICT OF THE CITY OF LE[illegible], Respondents.

[illegible] FOR WRIT OF CERTIORARI TO THE [illegible] STATES COURT OF APPEALS FOR [illegible] EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

[illegible]

[illegible] for Petitioner.

[illegible] PUBLISHING CO., Law Book Makers, Chicago, Ill.

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In The

SUPREME COURT OF THE UNITED STATES

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NUMBER ———

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CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

———::———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

———::———

MAX KIER,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Central Electric and Gas Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, in the above cause designated in said court as Number 13705 Civil, wherein this petitioner was appellee and the respondent, C. Russell Mattson, Administrator of the Estate of William Brehm, deceased, appellant.

Said judgment was entered on the 11th day of April, 1949. The opinion of the court below is not yet reported, but is found on page 172 of the Transcript of Record in this cause, certified to on the 3rd day of June, 1949, by E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, submitted herewith.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States.

The matter involved in this cause, is that the respondent, a resident of the State of Nebraska, seeks damages against the petitioner, a Delaware corporation engaged in the business of supplying and distributing natural gas in the City of Lincoln, for the death of William Brehm as the result of an explosion occurring in the basement of the premises occupied by the Capitol School of the City of Lincoln, Lancaster

County, Nebraska, on December 19, 1945 (R2). The decedent was an employee of the School District of the City of Lincoln as custodian of the said Capitol School building (R37). The School District of the City of Lincoln owned a gas service line running from the curb line of the premises of the Capitol School for a distance of approximately 150 feet in a northwesterly direction, where it entered into the basement of the school building (R81, 126, 128, 129, 130. 131, 142, 149). The gas service line consisted of 1¼ inch cast iron pipe, buried under approximately four feet of earth, covered by a cement driveway, which in turn was covered with approximately seven inches of ice and snow (R44,45,92,101,118,121). Excavation made shortly after the accident revealed a section of the pipe, at a place where the pipe turned and approached the basement of the school building, to be deteriorated and porous (R70, 72). The respondent complained generally that this petitioner gas company was negligent in failing to inspect said gas service line and allowing the pipe to become deteriorated and unable to confine gas. No notice to the petitioner gas company was made of any escape of gas upon the premises of said school building, nor did the petitioner or its employees possess a knowledge of the condition of the service line which is complained of (R156). The trial judge directed a verdict for the petitioner, defendant, finding that the law of the State of Nebraska, which concededly controlled, fails to impose any obligation of inspection, supervision, or maintenance of a privately owned service line upon private premises, upon a supplier of gas in the absence of notice or knowledge of the escape of gas therefrom

imparted to it (R155,156). The United States Court of Appeals for the Eighth Circuit, one judge dissenting, reversed the United States District Court for the District of Nebraska, and remanded said cause for retrial, the court finding that dicta of the Supreme Court of the State of Nebraska supported the conclusion that the local law imposes the duty of inspection and maintenance of service lines upon private premises upon the utility company, and that the local law would allow a jury to find negligence of the petitioner from a mere showing that the service pipe in question had been in use for any considerable time (R178).

The questions presented by this petition for writ of certiorari are:

1. May the United States Courts, in an effort to determine and ascertain the controlling local law, take for guidance dicta and irrelevant expressions of the local court upon wholly dissimilar factual inquiries?

2. Has the Court of Appeals properly ascertained the law of the State of Nebraska with respect to the duties of suppliers of natural gas with reference to the inspection and maintenance of gas service lines located upon the private premises of its consumers?

3. Has the United States Court of Appeals properly ascertained the law of the State of Nebraska with respect to the imparting to suppliers of gas of constructive notice of the existence of latent defects in private service lines?

4. Did the United States Court of Appeals give proper consideration to the ascertainment and determination of the laws of the State of Nebraska with reference to this cause as made by the United States District Court?

The reasons relied upon for the allowance of this writ are:

1. The United States Court of Appeals in this cause, failed to give proper consideration to the determinations of the United States District Court as to the state of Nebraska law.

2. The United States Court of Appeals improperly and erroneously determined important questions of local law which control this cause.

3. The United States Court of Appeals, in an effort to ascertain the law of the State of Nebraska, took for guidance dicta and irrelevant expressions of the Supreme Court of the State of Nebraska upon wholly dissimilar factual situations.

4. The United States Court of Appeals in this cause has improperly ascertained the law of the State of Nebraska with reference to the duties of inspection, maintenance, and supervision by gas suppliers of private gas service lines.

5. The United States Court of Appeals has wholly disregarded decisions of the Supreme Court of Nebraska which establish the Nebraska law to be that the existence of latent defects is not constructively imparted or implied.

6. The United States Court of Appeals, in ascertaining the law of the State of Nebraska, has given improper and incomplete consideration to *Clough* v. *North Central Gas Company*, 150 Neb. 418.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

MAX KIER,
Counsel for Petitioner.

In The

SUPREME COURT OF THE UNITED STATES

NUMBER ———

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

OPINION BELOW.

The opinion of the court below, not yet reported, is found on pages 172 to 185, inclusive, of the Transcript of the Record in this cause, certified to on the 3rd day of June, 1949, by E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, and which is submitted herewith. The judgment of said court and which is complained of, was entered on the 11th day of April, 1949.

JURISDICTION OF COURT.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States. Specifically, it is contended that the United States Court of Appeals for the Eighth Circuit, in the arriving at its judgment, followed a method and procedure in conflict with decisions of other courts of appeals for other circuits, and has decided important questions of local law in a way that is in conflict with applicable local decisions.

STATEMENT OF THE CASE.

A concise statement of the case follows. (Opinion United States Court of Appeals for the Eighth Circuit, Trans. pp. 172-189).

On December 19, 1945, William Brehm, an employee of the School District of the City of Lincoln, while engaged as a custodian or janitor in the Capitol School building in Lincoln, Nebraska, came to his death as the result of an explosion of natural gas which occurred in the basement of the Capitol School building (R2-3). Action was instituted by the administrator of the estate of said decedent against the defendant, a Delaware corporation, the supplier of natural gas to the Capitol School building on the date of decedent's death (R2). The action was removed to the District Court of the United States for Nebraska, Lincoln Division (R1). Upon trial of the case, the plaintiff showed that a section of the gas service line upon the premises of the School District, and which had been paid for by the School District and installed at the di-

rection of the School District, had become porous and deteriorated (70, 72, 128, 129, 130, 131). No. notice of any escape of gas was ever made to the petitioner Gas Company or any of its employees, and the company had no knowledge of the fact that the service pipe, or any portion thereof, would no longer contain and confine natural gas (R152). The gas line in question, at the time of the explosion, was buried in four feet of earth, covered by a cement driveway which was capped by a covering of snow and ice (44,45,92,101, 118,121). No showing of any method or procedure for inspection which would have disclosed the condition of the pipe was made. The pipe had been placed in the ground by petitioner's predecessors approximately 25 years previously, and there was some evidence that under certain conditions of the soil the effective, practical life of such lines is from 10 to 15 years, although serviceable gas pipes laid more than 40 years ago are found in this community (R123). Upon this evidence, the trial judge directed a verdict for the defendant, petitioner herein, and dismissed plaintiff's cause upon the basis that the law of the State of Nebraska does not impose a duty of maintenance or inspection of private pipes upon a supplier of natural gas in the absence of actual notice or knowledge to the gas supplier of defect in the pipe or of the escape of gas (R145-157). The Court of Appeals for the Eighth Circuit, upon appeal, one judge dissenting, reversed the judgment of dismissal entered by the trial court, and remanded this cause for trial for the asserted reasons that there is considered dicta in decisions of the Supreme Court of the State of Nebraska indicating (1) that it is the law of the State of Nebraska that gas companies have the duty of mainte-

nance and inspection of private appliances in the absence of actual notice of defect therein and (2) that a jury might properly charge a gas supplier with constructive notice of defective service lines from the mere length of time that such lines had been in existence, and that such constructive notice is just as effective as actual notice (R172-189).

SPECIFICATION OF ERRORS.

It is respectfully suggested that the Court of Appeals for the Eighth Circuit erred in the following respects.

1. In that the court followed dicta and other immaterial expressions of the Nebraska Supreme Court and based its judgment of reversal upon such chance expressions.

2. That the court failed to give proper consideration to the determinations of the trial judge of the United States District Court for the District of Nebraska, Lincoln Division, as to the state of the law of Nebraska.

3. In that the court erroneously determined that the law of the State of Nebraska imposes a duty of inspection and maintenance of private pipes upon the supplier of gas in the absence of notice or knowledge of the defective condition thereof.

4. In that the court of appeals erroneously determined the law of the State of Nebraska to be that a jury might charge the supplier of gas with constructive notice of the condition of private supply pipes.

ARGUMENT.

I.

Specifications of Error Number 1.

Concededly, the law governing and controlling the disposition of this cause, is the law of the State of Nebraska. In its attempt at ascertainment of Nebraska law, the Court of Appeals for the Eighth Circuit followed the rule peculiar to this circuit to the effect that the state of local law may be determined by reference to dicta in the decisions of the local court. The court of appeals made a practical obeisance to this rule by applying to the case at bar statements wrenched from *Harms* v. *City of Beatrice,* 142 Neb. 219, 5 N. W. (2d) 287, which statements were wholly irrelevant to a determination of the matter before the court, and which were made with reference to a wholly dissimilar factual situation from that of the case at bar. *Harms* v. *City of Beatrice,* supra, involved injury to a pedestrian on a public way who had tripped upon a water meter which was installed by the city in its proprietary capacity on the public way. The question of liability of a utility company with reference to a private installation upon private premises was not involved. In its treatment of the Harms case, the Supreme Court of Nebraska spoke cursorily of the duty of the city with reference to service pipes that are a part of the water system and remarked that the city could not escape the duty imposed upon it with reference to the water system by reason of the fact that its customer had paid for the installation of the service line. Such statements and comments were aside excursions, unnecessary and irrelevant to the disposition of the case be-

fore it. The court of appeals, in its review, seized upon the statements of the Nebraska Supreme Court previously adverted to, and made such statements the basis for its judgment of reversal. It will be noted in a later division of this brief, that other statements and decisions of the Supreme Court of the State of Nebraska pointedly and definitely define the duty of gas companies with respect to private service lines in a manner contradictory to the dicta of the Harms case. What we are concerned with in this division, and by this specification of error, is the right of the federal court to premise its determination of the local law upon mere dicta and irrelevant expressions—statements that would not be treated as authoritative by the state court itself.

State v. *Marsh,* 107 Neb. 637, 187 N. W. 87.
City of Lincoln v. *Steffensmeyer,* 134 Neb. 613, 279 N. W. 272.
Yoder v. *Nu-Enamel Corp.,* 140 Neb. 585, 300 N. W. 840.

We submit that the Court of Appeals for the Eighth Circuit, in so determining the local law from dicta of the Nebraska court was following a rule contradictory to the rule of other circuits and contrary to better principle and reason.

The Second Circuit, in *New England Mutual Life* v. *Mitchell,* 118 Fed. (2d) 414, has clearly assumed the position that the determination of local law is not to be made from mere obiter and chance expression. The Sixth Circuit likewise has announced the rule that in the absence of a controlling decision by the highest court of the state, the federal court must, for itself, de-

termine the law with reference to the situation presented. *Phil. Nat'l Bank* v. *Ruff*, 76 Fed. (2d) 843. Other similar holdings are *Buder* v. *New York Trust Co.*, 107 Fed. (2d) 705; *Van Denbark* v. *Owens Illinois Glass Co.*, 110 Fed. (2d) 310; *C. R. Jennings* v. *Maestri*, 97 Fed. (2d) 679; *In Re Phoenix Hotel Co.*, 83 Fed. (2d) 724. The rule adopted and followed by the Court of Appeals for the Eighth Circuit, we submit to be contrary to the rule of this court as announced in *Carroll* v. *Carroll*, 16 How. (U. S.) 1275.

We concede that in its determination of local law, the federal courts are privileged, and indeed should, consider all available data in order to arrive at a proper conclusion. Such weighing of the available data does not justify the federal court in disregarding the sound and reasonable rule arising out of the common law of the state. The function of the federal court would seem to involve something more than a mere finding of judicial expression by the local court which can be tortured into some application to the immediate situation. The duty of the federal court would appear to be to make a reasoned and weighted determination of the local law. The court of appeals in the case at bar made no effort to assay the soundness or quality of the chance expressions found by it, but is content merely to observe that such expressions offer a possible basis for a submission of this cause to a jury. As so followed and applied, the considered dicta rule of the Court of Appeals of the Eighth Circuit is contrary to decisions of the other circuits and contrary to sound public policy.

II.

Specification of Error Number 2.

The court of appeals, in its review of this cause, based its conclusion upon a search and determination of the local law made entirely independently of and uninfluenced by, the research, knowledge, and considerations of the learned trial judge. Such independent ascertainment was made because the court of appeals believed that the trial judge "did neither purport to follow, or be influenced by, any adjudication of the Supreme Court of Nebraska" (R181). By reason of this observation, the court of appeals deprived itself of the extensive, learned, and thorough analysis of the local law made by the trial judge, who himself had been a practitioner at the bar of the State of Nebraska for many years and who had thereby a special competence to determine the legal issues presented by this controversy.

The oral opinion delivered by the trial judge, and the written opinion entered by the trial judge on respondent's motion for new trial made in the district court, made full reference and extensive inquiry into all of the Nebraska decisions advanced by counsel, and which could be said to have a bearing upon this case (R15, 145). Thus, the trial judge observed, with reference to *Harms* v. *City of Beatrice,* 142 Neb. 219:

> "I consider that this case is entirely out of point with the present action," (R153)
>
> "cannot, without judicial extension and distortion, estimate any view of the Nebraska Court upon a question of the matter before the court" (R18).

The trial judge noted that the general law is to the effect:

> "That in the absence of notice of a leaky or otherwise defective condition thereof, a company supplying gas is not under a duty to keep in repair or inspect pipes or appliances on private property" (R151).

The trial judge observed that *Fonda* v. *Northwestern Public Service Co.*, 134 Neb. 430, and 138 Neb. 262, was entirely consistent with the general law, and indeed, was a recognition of the general rule (R17). The trial judge therefore concluded that the general and common law applied in Nebraska and that the facts would not make out a case from which legal liability could be imposed (R18, 19).

This court has explicitly held that the findings as to the local law, made by the trial judge, are entitled to great consideration. In *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 83 L. Ed. 598, this court said:

> "This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusion."

Again, in *Huddleston* v. *R. H. Dwyer,* 322 U. S. 232, 88 L. ed. 1646, this court stated:

> "When the Supreme Court is called upon to decide questions of state and local law, the expressions of the views of the judges of these courts who are familiar with the intricacies and trends of local law and practice, if not indispensible, is at least a highly desirable and important aid to our determination of state law questions."

It may be observed that one member of the court of appeals upon his independent analysis of the law of the State of Nebraska found:

> "Careful examination of the Nebraska decisions as of the time of the trial of this case, convinces me that the trial judge was correct in this statement" (R186).

The contrary determination made by two judges of the court of appeals was entirely uninfluenced by the findings of the trial court. In this, the court of appeals failed to follow its own decisions (*Russell* v. *Turner*, 148 Fed. (2d) 562; *Abbott* v. *Arkansas Utilities Co.*, 165 Fed. (2d) 339). At the very least, this contrariety of legal findings among the various judges who have made inquiry and investigation into the local law warrants a reinquiry and redetermination of those issues. (*Cities Service Co.* v. *Dunlop*, 308 U. S. 208, 84 L. ed. 196).

III.

Specification of Error Number 3.

It is concededly the general rule that suppliers of natural gas have no duty of inspection or maintenance of private pipes or appliances in the absence of duty having been undertaken, or actual notice of knowledge of the defective condition thereof (28 C. J. 735, Title Gas, Section 59 (d); 24 Am. Jur. Title, Gas, paragraph 32 page 686; 138 A. L. R. 883; Shearman and Redfield, Negligence, Volume 4, Section 766, page 1754). The court of appeals in reviewing this cause, came to the conclusion, one judge dissenting, that there were declarations by the

Supreme Court of the State of Nebraska, making "it clear that the service pipe was a part of the Gas Company's system," and that, though such instrumentalities may be the property of the consumer, that the gas supplier has a continuing duty of inspection and maintenance thereof (R180). In this connection, it is contended that the court of appeals has misinterpreted and misapplied Nebraska cases and has made an erroneous determination of the Nebraska law, and that, therefore, the petition for writ of certiorari is properly asserted (*Rorick* v. *Devon Syndicate,* 307 U. S. 299, 83 L. ed. 1303).

The majority opinion of the court of appeals, in concluding that the Nebraska law is different and contrary to the rule almost universally prevailing in other states is predicated almost entirely upon certain statements made by the Supreme Court of Nebraska in *Harms* v. *City of Beatrice,* supra. As has previously been observed, the cause of injury in the Harms case was a defective water box installed on a public way. There was, therefore, no occasion for the court to consider the liability of the city as a supplier for private installations made upon the customer's property, nor did the Nebraska court attempt to deal with that different situation. The Supreme Court of Nebraska, however, considered the components making up a water works system and stated, "the operation of a water works system, requires not only a pumping plant and a series of water mains, but it requires service lines to the property of the consumer as well." The Supreme Court of Nebraska followed this observation with the statement:

"The fact that the consumer may be required to pay the cost of labor and materials in the installation of the service lines, does not seem to us to be controlling."

From these statements of the Supreme Court of Nebraska, the court of appeals, two judges deciding for the court, concluded that the service line in the case at bar was a part of the Gas Company's system, and under which the petitioner was charged with a continuous duty (R182).

Even in the absence of other decisions and more specific declarations by the Supreme Court of Nebraska, it is evident that the Harms case does not warrant the conclusion arrived at by the two judges of the court of appeals. It should be evident (1) that the Harms case did not consider, has no bearing upon, and that there was no contemplation by the Supreme Court of Nebraska of the situation where private installations have been made upon the private property of the consumer; (2) the declarations of the Supreme Court of Nebraska were with reference to service pipes "to the property of the consumer." In other words, the side remark of the Nebraska court was with reference to company's lines brought to the property of the customer, and the Nebraska court was not considering, did not have before it, and cannot be assumed to be dealing with pipes of the supplier's consumer and on the consumer's property. The manifest error of the court of appeals lay in the indiscriminate use of the term "service pipes." A service pipe might consist of lines of the company laid to the property of the customer, it may also consist of lines of

the customer laid upon the property of the customer. The remarks by the Supreme Court of Nebraska referring to "service pipes" cannot be taken out of their context and out of the setting before the court, and considered to be a declaration of that court with respect to pipes of whatever nature and installation and wherever found, and particularly so when the Supreme Court of Nebraska qualified its observations by reference to pipes "to the property of the consumer."

When considered in the light of other decisions of the Supreme Court of Nebraska, it becomes clear that the court of appeals was entirely erroneous in its determinations. Thus, the court of appeals failed to note the statements of the Supreme Court of Nebraska in *Fonda* v. *Northwestern Public Service Co.*, 134 Neb. 538, in which the defendant service company had improperly installed and thereafter failed to repair a conversion burner after its attention had been directed to a defect therein. The Supreme Court of Nebraska said:

> "Having undertaken this inspection, it was the duty of the appellees to exercise ordinary care in making such inspection and to make any reasonable repairs * * *. The company is not required to keep up a consistent inspection, but when its attention is called to the trouble, and it undertakes to remedy it, then this inspection, where there may be great danger, should be thorough and efficient."

The Fonda case was again before the Supreme Court of Nebraska in 138 Neb. 262, and that court again held:

> "Having undertaken this inspection, it was the duty of the employee to exercise ordinary care in

making such inspection and to effect any necessary repair."

The Fonda case thus admits of the clear implication that as to private pipes or appliances, and in the absence of defect in the original installation, and in the absence of notice or inspection having been undertaken and assumed, that no duty of inspection, repair, or maintenance, is imposed upon the utility company. The clear implications of the Fonda case are pointed up in *Clough* v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862. This case was an action to recover damages sustained in a gas explosion caused by a leak in the customer's service line. The Supreme Court of Nebraska had before it, therefore, a determination of the exact question necessary for determination in the case at bar, namely, what is the duty of the gas supplier with respect to service pipes upon the property of its consumer, and which lines belong to the consumer? The answer to this question is stated in the syllabus prepared by the court:

"A legal duty of a gas company as to third persons in reference to the escape of gas from service lines owned and controlled by others on private property, and leading from the company's pipes in the street to its meter in the consumer's building, the pipes having been properly installed and tested, determined to be safe for use, and actually safely used for some time, does not extend to thereafter making inspections of said service pipes, unless the company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom, or unless the company is bound by contract, franchise, or custom, to make such inspection."

In the particular case, evidence was adduced to the effect that complaint had been made to the manager of the gas company, that gas was escaping in the building, and that the gas company has thereby received notice that there were defects, permitting the escape of gas. The conclusion of the Supreme Court of Nebraska, therefore, was:

> "Thus, where it appears that a gas company has knowledge that gas is escaping in a building occupied by one of its consumers, it becomes the duty of the gas company to shut off the gas supply until the necessary repairs have been made, although the defective pipe apparently does not belong to the company and is not in its charge or custody * * * . We believe the record discloses evidence sufficient from which the jury could find that the gas company had notice of the defective condition existent, and as it did have such notice, it becomes a question for the jury whether or not it made proper inspection and repairs with reference thereto."

The Nebraska court, in the course of its opinion, referred to *Stephany* v. *Equitable Gas Co.*, 347 Pa. 110, 31 Atl. (2d) 523; *Windish* v. *Peoples Natural Gas Co.*, 248 Pa. 236, 93 Atl. 1003; *Wilson* v. *East Ohio Gas Co.*, 68 Ohio App. 490, 42 N. E. (2d) 180, and to the annotation appearing in Volume 138 A. L. R., page 883. All of these citations refer to jurisdictions which have enunciated and follow the general rule to the effect that the responsibility of the gas company arises from knowledge of a dangerous condition and not by reason merely of the existence of the condition. The Clough case plainly is an expression of the general rule, and its clear effect is to place Nebraska among the

great majority of American jurisdictions which do not impose liability upon a supplier of gas with respect to installations upon the property of its consumers in the absence of actual notice of the defect in such installation or of the fact that gas is escaping therefrom. The contrary conclusion of the court of appeals is not in consonance with the Nebraska decision, is not supported by a proper analysis of the Nebraska decisions, and is a wholly erroneous determination of the Nebraska law.

IV.

Specification of Error Number 4.

The court of appeals, in part, predicated its conclusion upon the basis:

> "While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe, and it was charged with knowledge, at least the jury might have so found, that the pipe had probably become perforated. * * * Under the circumstances disclosed by the record, the jury might properly have charged the company with constructive notice, and if so, that notice is just as effective as actual notice" (R178).

The pipe in question had been laid some four feet underground, was covered by a cement driveway, which at the time of the explosion was also covered by approximately seven inches of ice and snow (R70, 72). No method or procedure for finding the actual condition of the pipe, short of excavation thereof, was disclosed, or has ever been asserted. The effect of the opinion of the court of appeals is, therefore, that

a gas company is charged with constructive notice of the condition of service lines, from the fact alone that the company was aware that such lines had been safely used for some considerable time. The foregoing statement of the law is not a proper or accurate reflection of the law of the State of Nebraska, and the court of appeals was thereby in grevious error.

First, the state law of the State of Nebraska, as it is indeed the general law, is that the placing of one upon notice is not the equivalent of knowledge, but merely imposes a duty of inquiry and charges such person with what might have been learned through the exercise of reasonable inquiry. (39 Am. Jur., Section 13, page 241; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 40; *Hollenbeck* v. *Guardian National Life Insurance Co.*, 144 Neb. 684, 14 N. W. (2d) 330). Thus, in this particular case, if this petitioner was placed upon inquiry, it became chargeable with such knowledge of the condition of the pipe that it would have learned upon reasonable investigation and in the exercise of reasonable diligence. The escape of gas had not been discerned by any person on or about the premises of the Capitol School building. Nor is it suggested by anything that appeared in the evidence or record of this cause that any method of inspection or detection existed which would have revealed to the petitioner the true condition of the pipe. The opinion of the court of appeals in this respect is therefore incomplete, inconclusive, and would allow a jury to fix liability upon hypothesis, surmise, and conjecture. Secondly, it is clearly demonstrable, that it is the law of the State of Nebraska that knowledge, which is the basis of liability for negligence means actual knowl-

edge and not such knowledge as may be constructively implied. The court of appeals failed to note and consider the following cases which establish that the doctrine of implied notice does not apply in Nebraska so as to charge one with the existence of knowledge of latent defects.

Gates v. *City of North Platte,* 126 Neb. 785, 254 N. W. 418, in which the plaintiff sued for injuries received as the result of stepping upon a manhole cover which the city had placed over a water meter box located on the parkway immediately adjacent to the sidewalk. The cover broke under the plaintiff's weight. No claim was made that the cover had been improperly constructed or improperly installed, but that it had lost its strength so that it was no longer able to sustain weight, and had become deteriorated through natural processes of wear and tear. The Supreme Court of Nebraska determined that no liability could be imposed upon the city, saying:

> "In the absence of actual notice, it is not ordinarily liable for failure to discover the existence of a defect in a manhole cover which had been properly constructed, regularly inspected and apparently safe and secure * * *the injury sustained according to the evidence was not caused by any direct or positive act of the city or its servants, nor was it the result of negligence in original construction; but so far as we are advised by the record, it was the result of natural conditions * * * there is no evidence that the city had express notice of any defect * * * the ground of recovery against the city here is an act of commission or omission and it is necessary for the plaintiff to prove negligence on the part of the city. Negligence is an inference to be deduced from pri-

mary facts. It is not enough that an accident has happened, but it must be shown that the municipality was in fact guilty of negligence."

City of Omaha v. *Kochem*, 74 Neb. 718, 105 N. W. 182, in which it was sought to charge the city with liability for injuries to a pedestrian who had been injured by reason of a defect in a cover over a coal hole. The particular cover was apparently safe but bolts underneath which had been used to secure the cover had become broken and ineffective. The Supreme Court of Nebraska held that there could be no liability imposed upon the city under such facts, saying:

> "A city charged with the duty of keeping its streets and sidewalks in safe condition for use is not required to search for defects therein, where there is no reason to suppose defects may be found.
>
> "The city of Omaha must use ordinary care and diligence to keep its streets and sidewalks in reasonably safe condition for use by the public, but it will not be charged with implied notice of a latent defect in a sidewalk, not apparent on ordinary inspection, until such time or the happening of such event as will challenge the attention of a man of ordinary diligence charged with a like duty to such effect."

Struble v. *Village of Dewitt*, 81 Neb. 504, 116 N. W. 154, the Supreme Court of Nebraska again declared:

> "A city or village is not required to have its sidewalks so constructed and kept in repair as to secure absolute immunity to persons using them, nor is it bound to employ the utmost care and exertion to that end. Its duty is only to keep the sidewalks in reasonable safe condition for the use of persons passing over them."

The court noted with approval the rule previously stated in *City of Lincoln* v. *Pirner,* 59 Neb. 634, 81 N. W. 846:

> "A city in the absence of actual notice is not ordinarily liable for failing to discover the existence of a defect in a scuttle hole which had been properly constructed and was apparently safe and secure."

Hashberger v. *City of Schuyler,* 115 Neb. 639, in which the plaintiff was injured by a defective manhole cover which the city had caused to be placed on a public way between a sidewalk and a public fountain. The cover, as in the previous cases noted, was apparently safe but had deteriorated through natural processes which were not apparent upon visible inspection. The Supreme Court of Nebraska held that there could be no liability under such circumstances.

> "Since the defendant had no knowledge of such fact, and it is not shown that whoever moved the cover did so at the direction or by permission of any city official or employee, it cannot be said that any negligence has been shown that could render the defendant liable."

In *Knies* v. *Lang,* 116 Neb. 387, a situation was before the Supreme Court of Nebraska in which the plaintiff was injured when a high wind caused a board to be loosened and blown from a building owned by the defendant. The building had been constructed some 35 years previously. No complaint was made as to the original construction of the building, but that nails on the inner side of the board had become rusted and that thereby the board was not securely fastened, and was subject to being torn from the building. The Su-

preme Court of Nebraska, in its determination of that case, held specifically:

> "Latent defects which are concealed and an incident to ordinary wear and tear and so developed as to render discovery impossible, in the exercise of ordinary care, are casualties which no man can avoid without the exercise of extraordinary care and diligence which the law does not impose."

The court of appeals in its review of this cause, was in error in finding that the petitioner had an opportunity, by the exercise of reasonable diligence, to discover the true condition of the pipe. The court of appeals, in its review of this cause, was in error in determining that under the law of the State of Nebraska the petitioner could be charged with knowledge of the true condition of the service pipe in the absence of the showing by the respondent of the existence of tests, methods, and procedures which would have apprized the petitioner of the true condition of the pipe had such methods been utilized. The court of appeals, in its review of this cause, was in error in charging this petitioner with implied or constructive notice of latent defects in the service pipe, when such doctrine of implied notice has been clearly negatived by the Supreme Court of Nebraska. The court of appeals, in its review of this cause, has therefore erroneously determined propositions of law decisive of the issues involved in a manner inconsistent with, and in violation of, the law of the State of Nebraska as established and ascertained by the Supreme Court of the State of Nebraska. The petition for writ of certiorari should be granted so that a proper ascertainment and determination of important questions of local law may be made, and that this cause

may be determined in a manner consistent with the common law of the State of Nebraska and the opinions and decisions of the highest court of the State of Nebraska.

Respectfully submitted,

MAX KIER,
Counsel for Petitioner.

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In The

Supreme Court of the United States

Number 810.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

MAX KIER,
Counsel for Petitioner.

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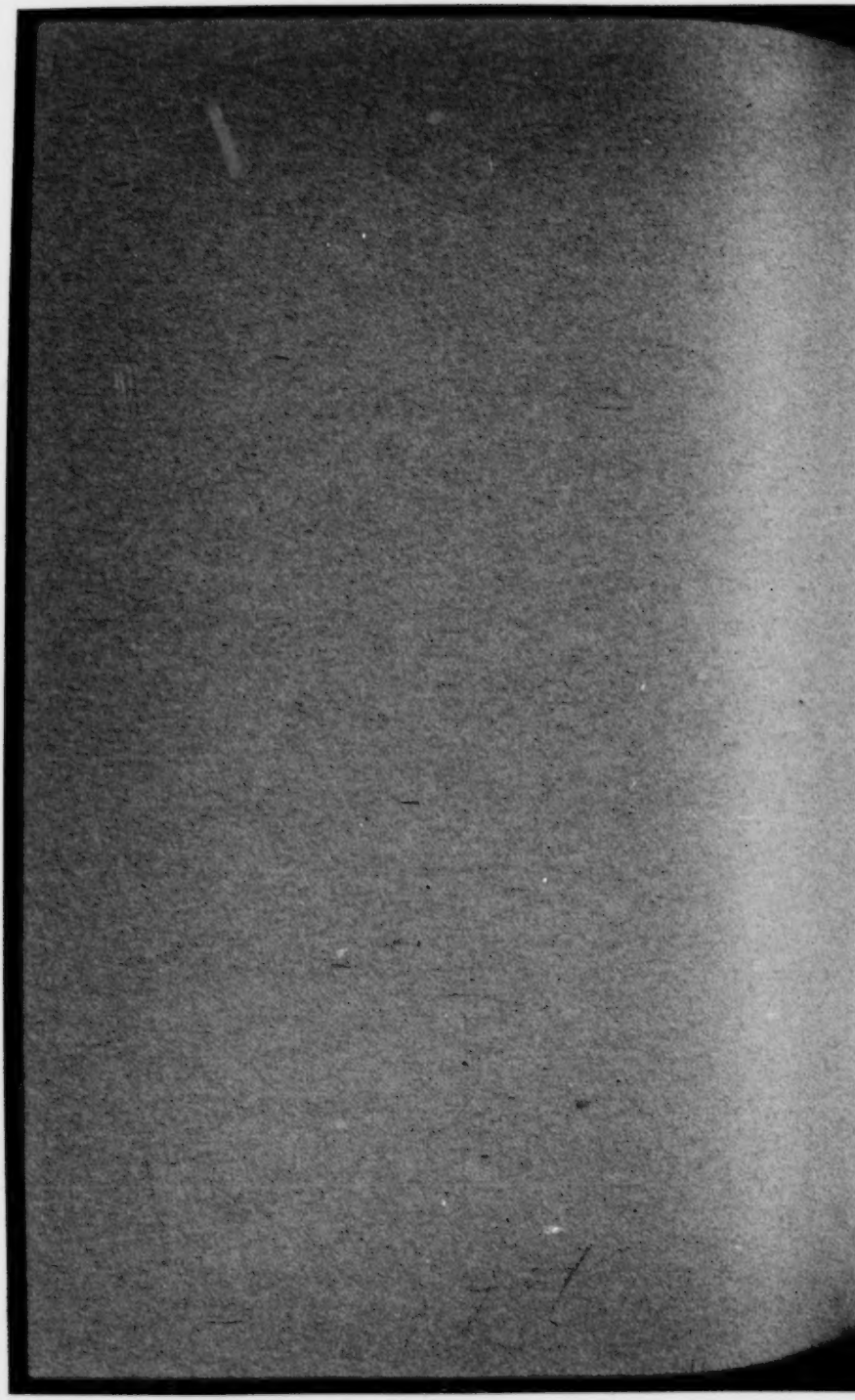

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In The

Supreme Court of the United States

Number 310.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

MAX KIER,
Counsel for Petitioner.

STATEMENT.

This reply brief is made necessary because of the apparent misunderstanding and misconception by the respondent as to the bases for petitioner's application. For purposes of clarification and proper understanding, some restatement of petitioner's position seems indicated.

OPINION BELOW.

The opinion below is now reported in advance sheets 174 F. (2d) 215.

JURISDICTION.

Jurisdiction is sought to be invoked by the petitioner for the reasons that; (1) That the Court of Appeals in the case at bar applied a rule in its ascertainment of the local law which is contradictory and in conflict with that of other United States Courts of Appeals, and (2), for the reason that the Court of Appeals in the case at bar has mistaken and misapplied the law of the state of Nebraska.

Respondent argues, apparently, that lack of jurisdiction exists to entertain this application. Respondent contends that the conflict between the United States Courts of Appeals has no pertinence for the reason that the matter involved is controlled by local law. The respondent argues further that the Court of Appeals in the instant case did not determine the state of the local law, but merely applied it. These several answers will be considered fully in sections of this brief devoted to argument. At this point it is appropriate, however to observe that conflict between the several courts of appeals as to matters within their cognizance is a sufficient reason for granting certiorari.

Rogers v. *Helvering*, 320 U. S. 410, 88 L. Ed. 134, 64 S. Ct. 172.

St. Paul Mercury & Indemnity Co. v. *Red Cab*, 303 U. S. 283, 82 L. Ed. 845, 58 S. Ct. 586.

Stelos Company v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 79 L. Ed. 1414, 55 S. Ct. 746.

It may further be observed at this point that this court may grant a writ of certiorari, and should do so, where the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

Cities Service Co. v. *Dunlop,* 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201.

Rorick v. *Devon Syndicate,* 307 U. S. 299, 83 L. Ed. 1302, 59 S. Ct. 877.

Rosenthal v. *N. Y. Life Ins. Co.,* 304 U. S. 263, 82 L. Ed. 1330, 58 S. Ct. 874.

Lauf v. *G. Shinner & Co.,* 303 U. S. 323, 82 L. Ed. 872, 58 S. Ct. 578.

Alice State Bank v. *Houston Posture Co.,* 247 U. S. 240, 62 L. Ed. 1096, 38 S. Ct. 496.

STATEMENT OF THE CASE.

Petitioner specifically denies the statement contained in respondent's brief under the caption, "Statement of the Case" to the effect that it is a permissive inference from the record that the service pipe which allowed gas to escape had a serviceable life of from 10 to 15 years. Petitioner further denies specifically respondent's statement that the record and evidence admits of the inference that the service line was at all times accessible, open and available to inspection. Such statements of fact were not found by the trial judge to be warrantable inferences from the record, and if indulged in by the Court of Appeals was made without proper deference and consideration to the factual findings of the trial court. We submit the doctrine of *Maggio* v. *Zietz,* 333 U. S. 56, 92 L. Ed. 476, 68 S. Ct., 401, to be applicable to the situation before the court in the case at bar:

> "Deference of an appellate court to the trial court's finding of fact presupposes that the trier of fact did not merely apply some supposed rule of law but exercised his judgment * * *. In reviewing a judgment of the district court, a circuit court of appeals may not make an independent evaluation of the evidence but is limited to a consideration of the justifiability of the district court's findings on the case in the record before it."

It is submitted, however, that viewing the evidence in the light as stated by respondent, and giving to the respondent every reasonable intendment and inference from their factual statement, that the law of the State of Nebraska properly determined, does not justify the submission of this case to a jury, and does not furnish any possible basis for liability.

ARGUMENT.

I.

Specification of Error Number 1.

Petitioner's first specification of error was that the Court of Appeals in the case at bar felt constrained in ascertaining the State of Nebraska law to have regard for, and give consideration to data, inferences and implications from the Nebraska decisions without respect as to whether such decisions considered situations analogous or comparable to that of the case at bar. Petitioner asserts that Courts of Appeals in other circuits have held that it is wrong and improper to speculate as to the state of the local law and that in the absence of a direct or pertinent local decision, that a weighted and analytical determination of the law is to be made. The respondent appears to argue that

no conflict exists between the several courts of appeals and that in any event the matter is one controlled by the local law. That a conflict exists between the several courts of appeals may be almost conclusively demonstrated. In the case at bar the Court of Appeals held that in the ascertaining of the Nebraska law, it was bound by the doctrine of *Yoder* v. *Nu-Enamel,* 117 F. (2d) 488. In that case the Court of Appeals for the eighth circuit said:

> "Where direct expression by authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. Having any convincing manifestation of local law a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference should accordingly be given appropriate heed."

As opposed and in decided conflict with this doctrine is the Court of Appeals for the fourth circuit as indicated by *New England Mut. Life Ins. Co.* v. *Mitchell,* 118 F. (2d) 414.

> "The respectful attitude toward the local courts where there has been no decision on the precise question before us is to consider the question in the light of the common law of the state with a view of reaching the decision which reason dictates and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta or upon speculation as to what the local court may decide in the light of dicta would be to depart from

> our solemn duty in the premises and to embark upon a vain and illusory enterprise."

In *Van Denbark* v. *Owens Illinois Glass Company*, 110 Fed. (2d) 310, the Court of Appeals for the seventh circuit held:

> "The Federal courts have an independent jurisdiction in administration of state laws co-ordinate with and not in subordination to that of state courts and are bound to exercise their own judgment as to the meaning and effect of those laws where interpretation has not been settled by definitive decisions by the state courts."

Other citations from other courts of appeals have been set forth in petitioner's original brief. These citations clearly establish that a conflict does exist between various of the United States courts as to their function and procedure in their ascertainment of the local law. The Court of Appeals in the case at bar has taken the position that the respondent is entitled to have his case submitted to a jury if there is any expression by the Nebraska court which can be strained or stretched to include respondent's theory of liability. The Court of Appeals in the case at bar has not found it necessary or needful to analyze all of the Nebraska holdings or to make a weighted determination of the Nebraska law, but merely to ascertain whether any expression of the Nebraska court can be found conforming in any respect to respondent's theory for the imposition of liability. This case therefore is an apt one to determine the conflict that exists between the various courts of appeals. Is it the duty of the federal court in a diversity case to make a qualitative analysis of the local law, or is its function discharged when

it allows a jury to impose liability based upon a wholly speculative ascertainment of the local law? The matter presented by this petition is one entirely within the cognizance of the federal courts and one upon which there exists a considerable diversity of judicial opinion. The ends of public policy make the resolution of this controversy appropriate.

We would believe it to be manifest that the methods and procedures to be employed by the United States courts in the ascertainment of the local law to be entirely a matter for the federal courts to determine. Since respondent contends that the question involved is one purely of local law, it is proper to note that the Supreme Court of Nebraska has noted and declared that it is not bound by, nor need it give any deference to previous opinions, statements and declarations which are not in the nature of precedent.

City of Lincoln v. *Steffensmeyer,* 134 Neb. 613.
Yoder v. *Nu-Enamel,* 140 Neb. 585.

Specification Number II.

Petitioner's specification number II is to the effect that the Court of Appeals in its review of this cause failed to give proper consideration to the conclusions and deliberations of the trial judge as to the state of the local law. Petitioner's original brief contains explicit references to the analyses as made by the trial judge, and demonstrates that the trial judge did analyze the state of the local law and did apply to the situation presented, the Nebraska law as it was found from a weighted consideration of the Nebraska decisions. The answer of the respondent in nowise con-

travenes this contention. The Court of Appeals took the view that the trial judge made his findings as to the state of the local law without reference to and independent of the Nebraska decisions. This position is clearly untenable and a reading of the oral opinion delivered by the trial judge, together with his several written memoranda demonstrates that the trial judge was scrupulous and meticulous in his analysis of the Nebraska cases, and in his application of those decisions to the situation presented. The answer of the respondent does not maintain the position or view so expressed by the Court of Appeals, and it is therefore logically inferable that respondent admits that the Court of Appeals was in error in its statement that the trial court did not "purport to follow or be influenced by any adjudication of the Supreme Court of Nebraska." In fact, the answer brief of the respondent expressly admits that the various opinions delivered by the district court "persuasively and conclusively indicated that it did apply the decisions of the Supreme Court of Nebraska" (p. 18, Brief of Respondent).

In the consideration therefore, of this specification of error we may now start with the concession that the trial judge in ascertaining the local law, considered and applied the decisions of the Supreme Court of Nebraska. The holding of the Court of Appeals does not purport to be guided or influenced by the ascertainment of the trial judge. In this, it is submitted, the intermediate federal court committed error. It seems quite settled that the conclusions of the district court sitting in the state is entitled to be given a special consideration in its determinations of the

local law. In *Gardner* v. *New Jersey*, 329 U. S. 566, 91 L. Ed. 504, 67 S. Ct. 467, this court said expressly:

> "Construction of state law by a judge of the federal court sitting in the state is entitled to special weight."

The Court of Appeals, in its review of this case, did not give any weight to the considerations and conclusions of the trial judge, but embarked upon an excursion of its own. The situation now existing in that a diversity of opinion exists among the federal judges who have considered this case as to the state of the local law, would appear to offer ample basis for the granting of a writ of certiorari.

Specification Number III.

Petitioner's specification of error number III is to the effect that the Court of Appeals erroneously determined that the law of the state of Nebraska imposes a duty of inspection and maintenance of private service pipes upon a supplier of gas in the absence of notice or knowledge of a defective condition existing therein. In the maintenance of this specification, petitioner noted that under the general rule almost universally regarded, a supplier of natural gas has no duty with reference to installations upon the premises of its consumers in the absence of duty of inspection or maintenance having expressly been undertaken or in the absence of notice or knowledge of a defective condition existing. Petitioner argues in its original brief that the Supreme Court of Nebraska has made reference to the various cases, precedents and authoritative material which are expressive of the general rule and that

therefrom a logical inference arises that Nebraska has adopted and follows the general rule. The brief of the respondent makes the contention that the weight and majority of the jurisdictions do not support the foregoing as a statement of the general rule. This contention is made without the dignity of a single supporting citation and without reference to any adjudicated case. As indicative of the general rule reference is made to 38 C. J. S. 734, Section 420:

> "If leaks or defects in the company's pipe occur because of faulty construction or otherwise through the company's fault, it is liable without notice for any resulting injuries to persons or property * * * but where the defect or break in the pipes is caused, not by negligence of the gas company, but by the act of a third person or through natural causes and where the company had used due care in inspecting its pipes to discover defects therein, liability does not attach until the company has had notice and a reasonable time to repair."

The general rule, we submit, was specifically followed by the Nebraska Supreme Court in the case of *Clough* v. *North Central Gas Company*, 150 Neb. 418. In view of the specific reference by the Nebraska Supreme Court in *Clough* v. *North Central Gas Company*, to the general rule and to the precedents expressing the general rule, there would seem to be some burden imposed upon the respondent of pointing out wherein the Nebraska court has departed or diverted from the general rule. The brief of respondent is conspicuous in its failure to make any such argument, explanation or analysis.

Specification IV.

Petitioner's fourth and final specification of error is that the Court of Appeals in its review of this cause wholly ignored settled decisions and doctrine of the State of Nebraska in its review of this case. The Court of Appeals, it is submitted, would allow liability to be imposed upon the petitioner for defect in the service pipe upon the basis that the company should have known of the defective condition of such pipe without a showing that the company did in fact have actual notice of such condition. It is submitted that this specification is crucial to petitioner's application. The brief of the respondent concedes that the Court of Appeals in its review did arrive at a determination that the law of the State of Nebraska would justify the imposition of a tort liability upon the petitioner, upon the basis of constructive notice being imparted to the petitioner of the state of the service pipe in question. The respondent argues, however, that such a determination of the Nebraska law is proper and that the decisions noted in petitioner's original brief are not in conflict with this asserted rule of law. This, then, presents a clear cut issue and the inferences from the resolution thereof are obvious. If the decisions contained in petitioner's original brief establish the Nebraska rule to be that in the event of a latent defect, liability for tort cannot be imposed in the absence of actual knowledge being imparted of such defect, then there has been a plain divergence by the Court of Appeals from the local law. Such misapprehension of the local law clearly having influenced the Court of Appeals in its review would, if established, warrant the allowance of writ of certiorari, proper and neces-

sary to bring about a correction. It is indispensable, therefore, to a determination of this application that it be determined whether or not the decisions referred to and set forth in petitioner's initial brief establish the rule to be that in Nebraska, liability for latent defect is dependent upon actual knowledge of the existence of the defect.

In the consideration of the several decisions contained in petitioner's original brief, it may be noted in the first instance that the Court of Appeals did not even make reference thereto and did not attempt an analysis or explanation thereof. We may assume, therefore, that the Court of Appeals in its determinations was not influenced, guided or controlled by these decisions. Yet, however, there is no suggestion in the brief of respondent that these cases and precedents do not hold that tort liability in Nebraska is predicated upon knowledge. The brief of respondent does not assail the conclusions which petitioner draws from these several cases, but argues that the holdings and rules therein contained are not applicable to the present situation. It would appear therefore, that the Court of Appeals in failing to comment upon these decisions did not even draw to its aid all of the Nebraska authority. We submit that no reasoned determination of the law of the State of Nebraska on this subject can be made without an analysis of the cases referred to in petitioner's brief (pages 24 to 27).

The respondent undertakes the task of distinguishing these several cases. The first attempted line of distinction is that the cases involving governmental subdivisions are peculiar to cities and villages in Nebraska,

and establish simply the rule to be that when governmental subdivisions are acting in a governmental capacity that negligence is predicated only upon a showing of actual knowledge. It is vigorously asserted that no such distinction was indulged in by the cases and that no such conclusion is tenable from these decisions. These several cases (*Gates* v. *City of North Platte*, 126 Neb. 785; *City of Omaha* v. *Kochem*, 74 Neb. 718; *Struble* v. *Village of DeWitt*, 81 Neb. 504; *Hashberger* v. *City of Schuyler*, 115 Neb. 639) involved actions for obstructions, defects and obstacles in streets, sidewalks and public places. The important principle to be borne in mind, however, is that in Nebraska, governmental subdivisions are not relieved from liability with reference to the proper maintenance of streets and sidewalks by reason of the fact that such subdivisions are acting in a governmental capacity. In Nebraska, political subdivisions, and particularly cities and villages are responsible for the condition of streets and sidewalks by reason of statute and because the maintenance of streets and sidewalks is one of the burdens which the governmental subdivision assumes and undertakes (*City of Omaha* v. *Olmstead*, 5 Neb. 446; *Cushman Motor* v. *City of Lincoln*, 97 Neb. 519; *Hanley* v. *Fire Proof Building*, 107 Neb. 544; *Chaney* v. *Village of Riverton*, 104 Neb. 189; *Bowman* v. *City of Omaha*, 59 Neb. 84). It is stated explicitly in *Hanley* v. *Fire Proof Building Company*:

> "The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public * * *."

In other words, these cases cited in petitioner's brief were general negligence actions and were determined by general negligence rules as found and established to exist by the Supreme Court of Nebraska. The decisions noted did not go off on any distinction between governmental and proprietory capacity but were resolved under the general rules of negligence liability existing in Nebraska. Under those decisions the doctrine of constructive notice of the existence of a latent defect does not exist in Nebraska and the Court of Appeals was in grievous error in its reliance upon the doctrine of constructive notice.

With reference to *Knies* v. *Lang*, 116 Neb. 387, the brief of respondent again attempts to make a wholly unwarranted distinction. Respondent urges that in the latter case a cause intervened for which the defendant could not be liable. We assert that the case did not turn upon the existence of a supervening or intervening cause and that there is no indication by the Supreme Court of Nebraska in its resolution of that case, that the defendant was relieved of liability because of an intervening cause. The several cases contained in petitioner's initial brief are all instances in which liability was sought to be imposed by reason of latent conditions involving apparatus which had become deteriorated due to natural causes. In all of those cases the Supreme Court of Nebraska was definite and explicit that in the absence of actual notice there can be no liability for failure to discover the existence of a defect. We submit that the Court of Appeals could not make a determination of the law of the State of Nebraska without a consideration of the several

cases cited, referred to and commented upon under specification IV of petitoner's brief. We submit that the Court of Appeals, in its review of this cause in finding that the law of the State of Nebraska warrants a submission of the liability of this respondent based upon the doctrine of constructive notice of the existence of latent defect is in plain disregard of the settled decisions of the State of Nebraska.

CONCLUSION.

We are constrained to observe that respondent's brief is compounded of confusion, misunderstanding and misinterpretation. We submit that the Court of Appeals, in its review of this cause failed to accord deference to the conclusions and findings of the trial court, misapprehended the state of the Nebraska law and arrived at a determination of the existence of the Nebraska law without a consideration of the pertinent decisions of that state and in disregard thereof. A proper respect for decisions of the State of Nebraska and a proper regard for a considered and just determination of this cause necessitates the granting of petitioner's application for writ of certiorari.

Respectfully submitted,

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION,
Petitioner,

MAX KIER,
Counsel for Petitioner.

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In The

Supreme Court of the United States

Number 310.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

RESPONDENT MATTSON'S ANSWER TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN ANSWER TO THE GRANTING OF THE WRIT.

WILLIAM L. WALKER,
MAX G. TOWLE,
ROBERT A. NELSON,
Counsel for Respondent,
C. Russell Mattson.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

ANSWER TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This court has no jurisdiction in this cause under Title 28, United States Code, Section 1254 and Rule

38, Subsection 5 (b) of Revised Rules of the Supreme Court of the United States.

There are no questions presented by the petition for writ of certiorari which can command a favorable ruling from this court, because all questions were properly and correctly answered by the United States Court of Appeals as follows:

1. That plaintiff's action should have been submitted to the jury, because, generally, question of negligence is one of fact.

2. Action for death which occurred in Nebraska was governed by substantive law of Nebraska.

3. Considered dictum of state court of last resort should not be ignored when a federal court is attempting to construe or ascertain the meaning of the local law.

4. Public utility distributing natural gas for public use must exercise every reasonable precaution to avoid injury or death by escape of gas while it is being carried through its pipes to the consumer, and the care required must be commensurate with danger which it is the utility's duty to avoid.

5. Public utility distributing natural gas for public use must not only install pipes and fittings of good material and workmanship but must see that equipment when installed and laid is maintained in a reasonably safe condition.

6. The foundation of liability for negligence is knowledge, but in law an opportunity by exercise of

reasonable diligence to acquire knowledge is equivalent to knowledge.

7. One under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance.

8. Janitor of school being served by natural gas company was member of public entitled to protection of rule requiring utility to exercise degree of care commensurate with danger involved.

9. Where public utility, at expense of school district, installed gas service line connected with utility's gas line and extending from street to school building, utility asserted exclusive right to make repairs on service pipe and undertook inspections, the utility had duty to exercise proper care and skill in making inspections, and whether it had done so was for jury in action for death of school janitor fatally injured by explosion caused by natural gas escaping from the service line.

10. Under Nebraska law, service pipe line from gas line to consumer's building where meter was located was part of utility's system, and fact that materials and labor going into construction were paid for by consumer was immaterial as between utility and member of public injured by explosion of gas which escaped from the service line.

11. Where federal district judge was in error in concluding that there were no pronouncements by state supreme court, either directly or in considered dictum, indicating views of that court on question of local law, federal court was not at liberty to substitute its

independent judgment, uninfluenced by adjudications of the state supreme court.

12. Under Nebraska law, public utility distributing natural gas could not delegate duty it owed to public to exercise proper care to maintain gas system in safe condition, but had continuing duty to exercise proper care to prevent injury from escaping gas.

13. Where gas in service pipe leading from gas line to consumer's premises belonged to public utility, the utility was under duty of using proper care to protect public from injury caused by dangerous propensities of gas in the service pipe.

14. Agents of public utility distributing natural gas knew or were presumed to know probable life or durability of material used in construction of service pipe from pipe line to consumer's building, and where pipes had been in use for approximately 27 years before explosion caused by gas escaping from a service pipe, jury might reasonably find that utility was charged with notice of defective condition of pipe.

15. Generally, the question of negligence is one of fact.

The reasons why this writ should not be granted are:

1. The United States Supreme Court ordinarily accepts the determination of local law by the United States Court of Appeals.

Ragan v. *Merchant's Transfer & Warehouse Co.*, 93 L. Ed. 1248, 170 Fed. (2d) 44.

Proper v. *Clark*, 93 L. Ed. 1206.

Busby v. *Electric Utilities Employees Union,* 323 U. S. 72, 89 L. Ed. 78, 65 S. Ct. 142.

Huddleston v. *Dwyer,* 322 U. S. 232, 237, 88 L. Ed. 1246, 64 S. Ct. 1015.

MacGregor v. *State Mutual Life Assur. Co.,* 315 U. S. 280, 86 L. Ed. 846, 62 S. Ct. 607.

Klaxon Co. v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020.

Palmer v. *Hoffman,* 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477.

In re Woods, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417, 418.

2. As to questions controlled by state law, conflict among United States Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of United States, as the conflict may be merely corollary to a permissible difference of opinion in the State Courts.

Ruhlin v. *New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860.

3. The United States Supreme Court will grant a writ of certiorari to a United States Court of Appeals involving application of local law only when such court has failed to apply the local law.

Erie R. Co. v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

4. The United States Supreme Court will not grant a writ of certiorari for sole purpose of reviewing the evidence and proper application of local law.

Erie R. Co. v. *Thompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; and all other authorities cited in 1 above.

5. The United States Court of Appeals correctly and properly determined the substantive law of Nebraska on the subject involved, by applying, considered dicta and persuasive data, such as compelling inferences and logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska on duties of inspection, supervision, maintenance and repair of a gas utility, gas service lines and liability for its violation and noncompliance with the law and neglect to perform the duty.

Erie R. Co. v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

Badger v. *Hoidale*, 8 Cir., 88 Fed. (2d) 208, 211, 109 A. L. R. 798.

Yoder v. *Nu-Enamel Corp.*, 8 Cir., 117 Fed. (2d) 488.

Hawks v. *Hamil*, 288 U. S. 52, 77 L. Ed. 610, 53 S. Ct. 240.

6. The United States Court of Appeals, correctly and accurately ascertained the law of Nebraska and gave complete consideration to:

Fonda v. *Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836.

Fonda v. *Northwestern Public Service Co.*, 138 Neb. 262, 292 N. W. 712.

Tarkington v. *Northwestern Public Service Co.*, 138 Neb. 278, 292 N. W. 720.

Clough v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862.

Harms v. *City of Beatrice*, 142 Neb. 219, 5 N. W. (2d) 287, 142 A. L. R. 239.

and did not base its decision on chance, or immaterial or irrelevant expressions but applied considered dicta, persuasive data such as compelling inferences and logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska some of which were taken from the cases cited with approval therein, including,

Julian v. *Sinclair Oil & Gas Co.*, 168 Okla. 192, 32 P. (2d) 31;

Manning v. *St. Paul Gas Light Company*, 129 Minn. 55, 151 N. W. 423, 424, L. R. A. 1915 E, 1022, Ann. Cas. 1916 E. 276.

Washington Gas Light Co. v. *District of Columbia*, 161 U. S. 316, 40 L. Ed. 712, 16 S. Ct. 564, 568.

City of Des Moines v. *Des Moines Water Co.*, 188 Ia. 24, 175 N. W. 821.

Therefore, the petition for writ of certiorari filed herein should be dismissed.

WILLIAM L. WALKER,
MAX G. TOWLE,
ROBERT A. NELSON,
Counsel for Respondent,
C. Russell Mattson.

In The

Supreme Court of the United States

Number 310.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR EIGHTH CIRCUIT.

OPINION BELOW.

The opinion below is now reported in advance sheets 174 F. (2d) 215.

JURISDICTION OF COURT.

The jurisdiction of this court cannot be invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5 (b) of the Revised Rules of the Supreme Court of the United States because the United States Court of Appeals for the Eighth Circuit cor-

rectly and properly arrived at its decision by applying the law of Nebraska applicable to the subject and it is immaterial that said decision may conflict with decisions of other United States Court of Appeals, which respondents specifically deny, and said decision in no manner conflicts with law of Nebraska applicable to the subject and in no manner can the decision be said to be a decision or an important question of local law but merely involves question of applying local law.

STATEMENT OF THE CASE.

Since the statement of the matter involved by the petitioner, is inaccurate in some respects and seriously lacking in some material respects, it is necessary for respondent, Mattson, to challenge the court's attention to other facts and evidence.

This is a petition for writ of certiorari by petitioner to review a judgment of United States Court of Appeals for Eighth Circuit which reversed, on appeal from United States District Court of Nebraska, Lincoln Division, a judgment for petitioner entered on a directed verdict (R10,189). The action was brought by C. Russell Mattson as administrator of the Estate of William Brehm, deceased, to recover damages for the death of William Brehm by the alleged wrongful act of the Central Electric & Gas Company under the death Statute of Nebraska (R2).

At the time of receiving the injuries from which he later died, William Brehm was employed as a custodian or janitor in the Capitol School Building in Lincoln, Nebraska. On December 19, 1945, while so employed, there was an explosion which blew him out

of the furnace room of the school building and inflicted bruises and burns upon him from which he later died (R24-28). The explosion was caused by escaping natural gas (R85). He is survived by his widow and three minor children (R135-138). It is plaintiff's claim that the explosion resulting in the death of William Brehm was caused by gas which escaped from the gas pipes serving the Capitol School Building, through the negligence of the Gas Company in that the company failed properly to inspect and keep in repair the gas pipes conveying the natural gas to the school building (R84,85).

Viewing the evidence in the light most favorable to plaintiff, the jury might reasonably have believed that about twenty-seven years prior to the time of the catastrophe causing the death of plaintiff's decedent, defendant's predecessor installed a gas service line connected with its gas line and extending from the street curb line to the Capitol School Building, in which building it installed a gas meter (R59-62,81,109, 128,167). Since that time defendant and its predecessor have used this service line for conveying its gas to the meter in the Capitol School. The Gas Company is a public company engaged in supplying and distributing natural gas to the inhabitants of the City of Lincoln, Nebraska. The school district paid the Gas Company for the material and labor in installing this service line, the material being selected by the Gas Company. The pipe was black iron or steel pipe (R117-120). The school district was a customer of the Gas Company and the gas supplied to the school building was passed through a meter belonging to the Gas Company as it was delivered to the school district. The

pipe used had a serviceable life of from ten to fifteen years (R123). From the time of its installation to the time of the explosion, this service pipe was not dug up and inspected, nor otherwise inspected, except that there was a superficial inspection of the service pipe made by the Gas Company once or twice in the spring of each year or along in the summertime. The inspection consisted of an examination of the grass or the top surface of the ground under which the pipe was laid. Repairs to the service lines, if any, were made by the Gas Company and under no circumstances would the Gas Company permit an independent plumber or any other person to make such repairs (R124-126, 131-133). The service line was laid under the school yard which was open ground, accessible at any point, so that the Gas Company had an opportunity to make any inspections or repairs desired. Investigation and inspection made subsequent to the explosion disclosed that portions of the service pipe had become rusted, corroded, decayed, porous and perforated with holes, which permitted the natural gas to escape so that it percolated, seeped and traveled to the coal bins of the Capitol School Building and accumulated in the coal basement and exploded, causing plaintiff's decedent's death (R67-71,88-97).

ARGUMENT.

I.

Petitioner's Specification of Error No. 1 has no Merit and Should be Overruled.

The Court of Appeals for the Eighth Circuit applied the rules of law in the cases of *Erie Railroad Co.* v.

Tompkins, supra, *Badger* v. *Hoidale,* (8 Cir.), supra, *Yoder* v. *Nu-Enamel Corp.* (8 Cir.) supra, *Hawks* v. *Hamil,* supra, which required the Court of Appeals and United States District Court in this case to apply the considered dicta and persuasive data, such as, compelling inferences or logical implications and other related adjudication and considered pronouncements of the Supreme Court of Nebraska on the subject involved; and in full compliance with this rule, the United States Court of Appeals applied the language in *Harms* v. *City of Beatrice,* supra, where the Supreme Court of Nebraska held the City of Beatrice liable for negligence to same extent as a private corporation engaged in the same business and in the course of the opinion the Court said:

> *"We do not think that the question of liability in this case can be determined from the nature of the contract between the city and the water consumer. The plaintiff was a member of the traveling public to whom a duty was owed by some one to maintain the water-works system in a reasonably safe condition. We are of the opinion that duty rests upon the city, irrespective of the terms of its contract with the consumer.*
>
> *"A city acts in its proprietary capacity when it engages in the operation of a water-works system and it is liable for negligence to the same extent as a private corporation engaged in the same business. The operation of a water-works system requires not only a pumping plant and a series of water mains, but it requires service lines to the property of the consumer as well. They all go to make up the distribution system. To say that the pumping plant and water mains alone make up the water-works system is but to fly into the face of the fact. Water is not delivered to the consumer*

when it arrives in the main in front of the consumer's property. It is delivered when it is made available for use.

"The fact that the consumer may be required to pay the costs of labor and materials in the installation of the service line does not seem to us to be controlling. Whether this be the means of fixing the connection charge or whether the consumer actually becomes the owner, the fact remains that it is a part of the water-works system which the city is duty bound to maintain in a reasonably safe condition for the protection of the public, irrespective of its contract with the adjoining property owner. While there may be a question whether liability of the consumer to the city exists by virtue of agreement among themselves, a question on which we express no opinion, it seems clear that the city cannot delegate the duty it owes the public to maintain the water-works system in a safe condition.

"The situation from a practical standpoint calls for the same conclusion. It is the city which reads the meters and obtains first hand knowledge of the condition of the service line. The consumer, with little knowledge of the business, relies upon the city in its capacity as operator of the utility to see that water is available for use. This is a duty the city assumes when it undertakes to render the service" (*Italics ours*).

The cases of *State* v. *Marsh*, 107 Neb. 637, 187 N. W. 87; *City of Lincoln* v. *Steffensmeyer*, 134 Neb. 613, 279 N. W. 272; *Yoder* v. *Nu-Enamel Corp.*, 140 Neb. 585, 300 N. W. 840, are no wise in point in support of the contention of petitioner, but to the contrary, clearly support the rule contended for by respondent and which was applied by the United States Court of Appeals in rendering the above decision on April 11,

1949, and taken from *Badger* v. *Hoidale,* (8 Cir.) supra; *Yoder* v. *Nu-Enamel Corp.,* (8 Cir.), supra; *Hawks* v. *Hamil,* U. S. supra; *Erie R. Co.* v. *Tompkins,* U. S. supra, which is that "considered dictum of the State Court should not be ignored where a federal court is attempting to construe or ascertain the meaning of the local law whether it be the Statute or the State Constitution." This rule authorizes the United States Court of Appeals to apply considered dictum which is defined as "a judicial opinion expressed by the writer on a point that is not necessarily raised and not involved in the case, on a point on which the judicial mind was not directed to the precise question necessary to be determined to fix the rights of the parties, constitutes dictum," *State* v. *Love,* 89 Neb. 149, 131 N. W. 196.

Petitioner's contention that what United States Court of Appeals for Eighth Circuit has decided is in conflict with decisions of other United States Court of Appeals from other circuits is immaterial in the language of this court in *Ragan* v. *Merchant's Transfer & Warehouse Co.,* supra, when the court said:

> "A decision of a court of appeals as to the law of the State included within the circuit will ordinarily be accepted and left undisturbed by the Supreme Court of the United States."

In *Proper* v. *Clark,* supra, this court said:

> "In dealing with issues of state law, the Supreme Court of the United States is hesitant to overrule decisions by Federal Courts skilled in the law of particular States unless their conclusions are shown to be unreasonable."

In *Huddleston* v. *Dwyer*, supra, this court said:

> "The Supreme Court of the United States will ordinarily accept, and therefore will not review save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts; and where such questions may be conveniently first decided by the court whose judgment is to be reviewed, the Supreme Court will not ordinarily decide them in the first instant."

In *Busby* v. *Electric Utilities Employees' Union*, supra, this court said:

> "Only in exceptional cases will the Supreme Court of the United States review a determination of a question of local law of the District of Columbia by the District of Columbia Court of Appeals."

In *MacGregor* v. *State Mut. Life Assur. Co.*, supra, this court said:

> "In the absence of a decision of any state court on the point the Supreme Court of the United States will leave undisturbed an interpretation placed upon a state statute by a local Federal district judge of long experience and by three judges of the Federal Circuit Court of Appeals whose circuit includes such state."

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, supra, this court said:

> "The proper function of the Federal Court, in a case governed by state law, is to ascertain what the state law is, not what it ought to be."

In *Palmer* v. *Hoffman*, supra, this court said:

> "Rulings of a lower Federal court applying local law will not be set aside by the Supreme Court except on a plain showing of error."

In re Woods, supra, this court said:

> "Whether the law of Minesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment, was properly applied on the trial of a case, are not questions of such gravity and importance as to require the review by this court of the conclusions of the Circuit Court of Appeals in reference to them."

In *Ruhlin* v. *New York Life Ins. Co.,* supra, this court said:

> "As to questions controlled by state law, conflict among Federal Circuit Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

Since the United States Court of Appeals decision applied the Nebraska law, and since it is immaterial whether other circuits may have pronounced different rules on different state and local law, the petition for writ of certiorari is not well taken and is without merit and should be dismissed.

II.

There is no Merit in Petitioner's Specification of Error Number 2.

The rule laid down by the United States Court of Appeals in its decision is a cogent and sound applica-

tion of the considered dicta of the decision of the Supreme Court of Nebraska. This opinion was written by Gardner, Chief Judge, who has had many years of experience in application of the decisions of Supreme Court of Nebraska in appealed cases to his court from the United States District Courts from Nebraska and Woodrough, Appeals Judge, who decided with Gardner, Chief Judge, in the majority opinion, was a practicing attorney in Omaha for many years, before serving as Judge of United States District Court of Nebraska, Omaha Division, and has during the time he has sat on the United States Court of Appeals applied and decided questions of local law involving decisions of the Supreme Court of Nebraska and was at the time that this case was presented to their court familiar with said Nebraska decisions which are here relied upon to sustain the accurate and correct rule sustained by the considered dicta of the Nebraska decisions creating the duty of petitioner to inspect, repair, supervise and maintain its gas service lines which it used to deliver its natural gas to customers and acquired knowledge by having an opportunity to exercise reasonable diligence to acquire knowledge, is equivalent to knowledge and petitioner was under duty to use care for which knowledge is necessary cannot avoid because of voluntary ignorance; the petitioner had constructive notice which is just as effective as actual notice.

The oral opinion delivered by the United States District Court at the time it directed a verdict against respondent (R145) and the written memorandum filed at the time the motion for a new trial was overruled (R15,

19) persuasively and conclusively indicated that it did apply the decisions of the Supreme Court of Nebraska under rule of the United States Court of Appeals for Eighth Circuit that "considered dicta and persuasive data, such as, compelling inferences or logical implications and other related adjudications and considered pronouncements by the Supreme Court of Nebraska on the subject," must be applied by the United States District and Court of Appeals.

III.

There is no Merit in Petitioner's Specification of Error Number 3.

It is difficult to justify the statement in petitioner's brief that states, "concededly, the general rule is that suppliers of natural gas have no duty of inspection or maintenance of private pipes or appliances in absence of duty having been undertaken, or actual notice or knowledge of the defective condition thereof;" while said statement is not decisive of the issues and points involved in this petition for writ of certiorari, the weight and majority of the jurisdiction do not support the rule announced under the evidence and facts of the case at bar. Most, if not all, of the jurisdictions and courts of appeal would sustain the decision of April 11, 1949, of the United States Court of Appeals and said rule stated is not applicable because no other rules can be applied other than those which were applied by the United States Court of Appeals.

IV.

There is no Merit in the Specification of Error Number 4.

The conclusion of the United States Court of Appeals in its opinion, held that:

> "In their facts these cases are so similar to the instant case that it seems to us that in principle they cannot be distinguished. The Company, as has been observed, furnished the material and laid these pipes and used them for the transmission of its gas to its meter in the school building. The natural gas which the Company was transmitting through this pipe was of highly dangerous character and it owed a duty to the public to exercise a degree of care commensurate with the danger involved in the transaction of its business. It knew when this gas line was laid and it was its duty to know what the probable life of the gas pipe would be in the soil where it was laid. While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe and it was charged with knowledge, at least the jury might have so found, that this pipe had probably become perforated. It knew that the pipe had been in the ground for more than twenty-five years and it, rather than the plaintiff's decedent, should have known what the condition of the pipe was and the danger arising from its deteriorated condition. Under the circumstances disclosed by the record the jury might properly have charged the Company with constructive notice and if so that notice is just as effective as actual notice. While the foundation of liability for negligence is knowledge, in law an opportunity by the exercise of reasonable diligence to acquire knowledge is equivalent to knowledge,

and one under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance. The Company had the sole right to make repairs, and according to the testimony of its manager it would under no circumstances permit an independent plumber or any other person to make repairs to its service line. But Brehm was not the owner of the property being served, nor the consumer of natural gas, but was one of the public who as such was entitled to protection.

"Not only was there evidence to warrant the jury in finding the defendant negligent because it was charged with notice as to the defective condition of this service pipe, but the evidence warranted the jury in believing that it made a superficial inspection twice a year."

In the Nebraska case of *Hollenbeck* v. *Guardian Natl. Life Insurance Company*, 144 Neb. 684, 14 N. W. (2d) 330, the court said:

"Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry."

To same effect is Nebraska case of *Talich* v. *Marvel*, 115 Neb. 255, 212 N. W. 540.

These cases do not support statement made by petitioner but on the contrary hold that petitioner had knowledge that after 27 years a 1¼ inch black iron or steel pipe which had a life from 10 to 15 years because they assumed each year to make two superficial surface ground inspections by observing whether the grass and vegetation was dying over or around service line through which petitioner delivered its natural gas from its main to its meter in the Capitol School Building.

In the case of *Harms* v. *City of Beatrice*, supra, the court said:

> "It is the city which reads the meters and obtains first hand knowledge of the condition of the service line. The consumer, with little knowledge of the business, relies upon the city in its capacity as operator of the utility to see that water is available for use. This is a duty the city assumes when it undertakes to render the service."

In the case of *Fonda* v. *Northwestern Public Service Co.*, supra, 134 Neb. 430, 278 N. W. 836, the court said:

> " 'When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor.'
>
> "In 28 C. J. 591, 592, 593, it is said: 'While no absolute standard of duty can be prescribed, it may be said, in general terms, that every reasonable precaution suggested by experience and the known danger of the escape of gas ought to be taken. This requires, in the case of a gas company, * * * that it shall maintain an efficient system of inspection, oversight, and superintendence. * * * A gas company must use due and reasonable care in the inspection of its pipes, to insure reasonable care in the inspection of its pipes, to insure reasonable promptness in the discovery of leaks that may occur from defects in or deterioration of pipes and valves, from careless or wrongful meddling with its works on the part of others.' "

To same effect is *Fonda* v. *Northwestern Public Service Co.*, 138 Neb. 262, 292 N. W. 712; *Tarkington* v.

Northwestern Public Service Co., 138 Neb. 278, 292 N. W. 720.

In *Clough* v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862, this court said:

> "Natural gas belongs to the company which dispenses it until it is sold through the meter to the consumer.
>
> "A gas company owes duty to general public to so operate its business and maintain its pipes as to prevent the escape of gas in such quantities as to become dangerous to life or property.
>
> "Where a gas company knows or should know that a service line owned by a customer is corroded to such an extent as to permit gas to escape, gas company must either cause gas line to be repaired by customer, or have gas shut off at street where the main is that furnishes the gas to the customer, in order to avoid the danger which might result."

After the United States Court of Appeals quoted evidence of petitioner's manager on casual inspection of surface ground over the service line twice a year, the court said in its opinion:

> "* * * we think this was some evidence that the defendant asserted the exclusive right to make repairs on this service pipe and that it and it alone had dominion over this pipe. It would tolerate no interference with this pipe even by the customer, and this, doubtless, because the pipe contained the deadly gas of the defendant. In these circumstances it made the inspection referred to. Having so undertaken to make inspection and having denied the right to any other person to make repairs on this pipe, it was its duty

> to exercise proper care and skill in so doing, and whether it had done so was, we think, a question of fact to be determined by the jury." (R180)

Petitioner's brief cites Nebraska cases of *Gates* v. *City of North Platte,* 126 Neb. 785, 254 N. W. 418; *City of Omaha* v. *Kochem,* 74 Neb. 718, 105 N. W. 182; *Struble* v. *Village of Dewitt,* 81 Neb. 504, 116 N. W. 154; *City of Lincoln* v. *Pirner,* 59 Neb. 634, 81 N. W. 846; *Hashenberger* v. *City of Schuyler,* 115 Neb. 639; *Knies* v. *Lang,* 116 Neb. 387. All of these cases except the latter, either were brought to recover injuries for tort of the city or village in regard to defects in streets, sidewalks and manhole covers over sewers on parkways while the city or village was functioning in its governmental capacity and not in its proprietory capacity as it was in the *Harms* v. *City of Beatrice,* supra, when it was acting as a utility in the dispensing of water; and there have been statutes in existence in the State of Nebraska such as Section 15-843, R. S. 1943, which provide that actual written notice must be given the city five days before the injury occurred that such defect existed in the public way or sidewalk; and statutes such as Sections 16-730 and 17-716, R. S. 1943, that no recovery may be had unless actual notice is given city as to injury, damage, place of happening and amount claimed by filing claim with city clerk within 30 days from date of injury; and in addition most of said cities and villages have ordinances to the same effect. With this further additional information, it is obvious that said cases involving functions of city and village in its governmental capacity as to streets, sidewalks and sewers are not analagous and applicable to the case at bar, and must be

distinguished from the *Harms* v. *City of Beatrice*, supra, case where the city was acting in its proprietor capacity in dispensing water for profit to customers and stood in the same position as a public utility would be or as the petitioner dispensing natural gas to the Capitol School Building in Lincoln is in the case at bar; and under such circumstances as is said by the court in *Harms* v. *City of Beatrice*, supra, "notice is not required as a condition precedent to liability."

The non-liability in the above cases against the cities or villages is predicated upon the failure to give one or the other notices required; and further that in each case it is not shown that the city in its governmental capacity had no notice whatsoever of the condition; but the petitioner is a public utility in business for profit and is not entitled to be clothed with protection such as a governing body of a city functioning in its governmental capacity; the petitioner is in the identical position the city would be if functioning in its proprietor capacity as in the *Harms* v. *City of Beatrice*, supra, where it was charged with a duty to use diligence in inspection, supervision, maintenance and repair and be subjected to liability for its negligence in performing such imposed duty, and, of course, these cases didn't involve highly dangerous natural gas and the care required in its dispensation thereof. The case of *Knies* v. *Lang*, supra, is not applicable to the case at bar because the board that fell from the building and injured plaintiff in the case was blown from the building by a high wind; the board was not a dangerous instrumentality as highly dangerous as natural gas that was dispensed through the service line in question in the case at bar where the facts

show that no intervention of any kind occurred, either human or otherwise, that caused the service line with a life of 10 to 15 years, to become decayed, rotted, perforated and full of holes as a result of delivering natural gas through the same for a period of 27 years or longer. The United States Court of Appeals so aptly said in its opinion that:

> "Under the Nebraska decisions the Gas Company could not delegate the duty it owed to the public to exercise proper care to maintain its gas system in safe condition, but it had the continuing duty to exercise proper care to prevent injury from escaping gas. Hence, the mere fact that the service pipe was paid for and possibly was the property of the consumer, did not shift the duty of exercising proper care. The gas in the service pipe, as before noted, was that of the defendant, and as long as it remained its property it was under the duty of using proper care to protect the public from injury caused by the dangerous propensities of that property. A proper regard for the safety of the public would seem to forbid the owner of such dangerous agency to avoid liability for damage by simply housing such property in a container belonging to some one else, particularly when the owner of such dangerous agency knows, or is charged with knowledge, that the housing or container facilities are in a decayed, dilapidated and deteriorated condition. The agents and employees of the Company are presumably skilled in the business of their employer. They knew, or were presumed to know, the probable life or durability of the materials used, where the pipes have been in use as long as the pipes in the instant case, the jury might reasonably find that the Company was charged with notice of their condition."

CONCLUSION.

Therefore, because of reasons above given, the judgment of the Court of Appeals of Eighth Circuit made and entered on April 11, 1949, by Gardner, Chief Judge and Woodrough, Appeals Judge (R189), is correct on application of the Nebraska law and considered dicta of the decisions of Supreme Court of Nebraska and related adjudication on the subject on evidence and facts of the case when it reversed the United States District Court order, made and entered on December 5, 1947, sustaining the motion of petitioner for a directed verdict at close of respondent's evidence and direction of jury to return a verdict, and entry of a judgment thereon dismissing respondent's complaint and cause of action with prejudice at his costs (R157), and trial court's order of December 29, 1947, overruling respondent's motion for a new trial (R19) and the judgment of the Court of Appeals of Eight Circuit should be affirmed by denying petitioner's petition for writ of certiorari.

Respectfully submitted,

WILLIAM L. WALKER,
MAX G. TOWLE,
ROBERT A. NELSON,
Counsel for Respondent,
C. Russell Mattson.

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In The

Supreme Court of the United States

No. 310.

CENTRAL ELECTRIC AND GAS COMPANY,
A Corporation, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF LINCOLN, IN THE COUNTY OF LANCASTER, IN THE STATE OF NEBRASKA, A CORPORATION, RESPONDENTS.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MAX KIER, Lincoln, Nebraska,
Counsel for Petitioner.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Central Electric and Gas Company, a corporation, does hereby respectfully request that re-

hearing of this petitioner's application for writ of certiorari to review the judgment of the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause be granted.

Petitioner shows that its application for writ of certiorari was denied on November 7, 1949.

This petition for rehearing is made under the provisions of Rule 33 (2) of the Revised Rules of the Supreme Court of the United States.

The controlling question governing the disposition of petitioner's application for writ of certiorari is the state of the law of the State of Nebraska with respect to the liability of suppliers of natural gas with reference to defects in the supply lines of its consumers of which the supplier neither had notice nor knowledge.

The grounds on which this petition for rehearing is based are:

1. That there is available other persuasive data as to the state of the Nebraska law with reference to the liability of the suppliers of natural gas with respect to the maintenance and preservation of service lines, which was neither considered by the United States Court of Appeals in its review of the judgment of the United States District Court for Nebraska, Lincoln Division, and which was not available to this court in its consideration of petitioner's application for writ of certiorari.

2. That the adjudication made by the District Court for the Tenth Judicial District for the State of Nebraska in the cause entitled *National Ben Franklin Fire Insurance Company* v. *The City of Hastings,*

Nebraska, case Number 12,624, previously not available to the court is a persuasive indication that the law of the State of Nebraska, contrary to the holding of the United States Court of Appeals, does not impose liability upon suppliers of natural gas for defects in the service lines of its consumers in the absence of actual notice of the defect in such lines having been communicated to the supplier.

3. That by reason of the unavailability of the decision of the District Court for the Tenth Judicial District in the State of Nebraska in said cause entitled *National Ben Franklin Fire Insurance Company* v. *The City of Hastings, Nebraska,* there exists intervening circumstances of substantial and controlling effect and substantial grounds for petitioner's application not previously presented to this court. Reference is made to the attached appendix for summary of the proceedings referred to, which is expressly incorporated in and made a part hereof.

For the foregoing reasons petitioner respectfully urges that a rehearing be granted; and upon further consideration the order of November 7, 1949, denying the petition for writ of certiorari be revoked; and that the writ of certiorari issue.

MAX KIER,
Attorney for Petitioner.

CERTIFICATE.

Comes now Max Kier, counsel for Central Electric and Gas Company, a corporation, petitioner, request-

ing rehearing of the order of the court denying petitioner's application for writ of certiorari and certifies that the above and foregoing petition for rehearing is presented in good faith and not for delay and that this petition is restricted and confined to intervening circumstances of substantial effect and to substantial grounds available to the petitioner, although not previously presented.

MAX KIER,
Counsel for Petitioner.

In The

Supreme Court of the United States

No. 310.

CENTRAL ELECTRIC AND GAS COMPANY,
A Corporation, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF LINCOLN, IN THE COUNTY OF LANCASTER, IN THE STATE OF NEBRASKA, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

STATEMENT.

Petitioner's application for writ of certiorari was denied on November 7, 1949. The basis for this petition for rehearing is the existence of other circumstances of substantial or controlling effect and other substantial grounds available to petitioner not previously presented. This petition is made under rule 33 (2) of the Revised Rules of the Supreme Court of the United States and under the sanction of *Sanitary Refrigeration Co.* v. *Winters,* 280 U. S. 30, 50 S. Ct. 9, 74 L. ed. 147; *Massey* v. *U. S.,* 291 U. S. 608, 54

S. Ct. 532, 78 L. ed. 1019; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 59 S. Ct. 8, 83 L. ed. 34.

A motion for directed verdict was sustained by the trial court in this cause, to-wit: The District Court of the United States for the District of Nebraska, Lincoln Division, because of the failure of the evidence to disclose that the petitioner, defendant in said cause, had any knowledge or notice of the existence of the defect in the supply lines through which it introduced natural gas, or had any notice or knowledge that gas was leaking in and about the premises, or being confined or otherwise impounded. The trial court held that the disclosure of such notice or knowledge was a prerequisite to the imposition of liability upon a supplier of natural gas for defects or deterioration in supply and service lines located in the property of its consumers. The United States Court of Appeals for the Eighth Circuit—one judge dissenting—reversed the trial court and remanded this cause for rehearing upon the asserted basis that under the Nebraska law, liability could be imposed upon suppliers of natural gas in the absence of actual notice or knowledge being imparted to the supplier and based solely and only upon the implied knowledge of the supplier as to the length of time the service and supply lines had been in the ground (Opinion of the Court of Appeals may be found in 174 F. (2d) 215).

Petition for writ of certiorari was duly filed in this court for the reason that the United States Court of Appeals had improperly resolved important questions of local law. Petitioner's brief suggested and indicated

other holdings of the Supreme Court of the State of Nebraska in negligence actions indicating that liability for negligence in the State of Nebraska is predicated upon actual knowledge rather than any doctrine of constructive knowledge. Petitioner's application for writ of certiorari did not make reference to *National Ben Franklin Fire Insurance Company* v. *the City of Hastings, Nebraska,* a municipality, being case Number 12624 of the Tenth Judicial District of the State of Nebraska. That adjudication was made by a court of general jurisdiction of the State of Nebraska (Sec. 9, Art. 5, Const. of Neb.) That adjudication which terminated by an order of the court overruling the motion of the plaintiff therein for a new trial made on February 25, 1949, has since become final. Though it is a determination of an intermediate court of the State of Nebraska, it is entitled to consideration as persuasive data available as to the state of the local law of the State of Nebraska. (*Hawks* v. *Hamil,* 288 U. S. 52, 535 S. Ct. 240, 77 L. ed. 610).

The adjudication referred to is of importance in that it directly considered the liability of the City of Hastings, Nebraska, in its proprietary capacity as a supplier of natural gas. It directly involved the liability of such supplier of natural gas for defect in the service and supply lines of its consumer. Other factual similarities will be pointed out. It is petitioner's contention that this adjudication previously unavailable and not submitted constitutes grounds for a reconsideration by the court of its order denying petitioner's application for writ of certiorari.

ARGUMENT.

The case of *National Ben Franklin Fire Insurance Company* v. *The City of Hastings, Nebraska,* case #12624 of the Tenth Judicial District of the State of Nebraska, as previously indicated, was an action against a supplier of natural gas, the City of Hastings, Nebraska, for damage to the property known and described as the Elks Lodge, which damage resulted from an explosion of gas traceable to a break in the service line placed in the property of the Elks Lodge. A certified copy of the petition and amended answer are attached hereto as an appendix and are made a part of this brief. Trial was had, evidence adduced and at the conclusion thereof a motion for a directed verdict was made by the defendant, the City of Hastings. The motion was predicated upon the failure of the evidence to disclose that the city had any notice or knowledge of the defect, which permitted the escape of gas. The motion was considered by the court, argument as to the law of the State of Nebraska was presented by the respective counsel and at the conclusion thereof the court sustained the motion for a directed verdict, and at the instruction of the court a verdict was returned in behalf of the defendant and against the plaintiff. The basis for the direction of the verdict and the action of the trial court in sustaining the motion was the failure of the evidence to disclose actual knowledge on the part of the defendant as to the existence of the defect which gave rise to the explosion and damages consequential thereto. In the absence of the showing of such actual knowledge, negligence could not be made out.

A synopsis of the proceedings which were had is attached hereto as a part of the appendix and made a part of this brief. It is submitted that the United States Court of Appeals in its review of this cause, and that this court in its consideration of petitioner's application for writ of certiorari did not have before it all of the data now available as to the state of the Nebraska law upon the important question thus presented and that this petitioner is entitled to a rehearing of its petition in the light of the fuller data now presented.

Respectfully submitted,

CENTRAL ELETRIC AND GAS COMPANY,
A CORPORATION,
Petitioner,

MAX KIER,
Counsel for Petitioner.

APPENDIX

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

PETITION #12624.

NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, subrogees of BENEVOLENT AND PROTECTIVE ORDER OF ELKS #159, HASTINGS, NEBRASKA, Plaintiffs,

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendants

Comes now the plaintiffs and for their cause of action against the defendant, allege:

1. That the plaintiff, National-Ben Franklin Fire Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and in all times mentioned herein was authorized to do business in the State of Nebraska.

2. That the Milwaukee Mechanics' Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all times herein mentioned was authorized to do business in the State of Nebraska.

3. That at all times herein mentioned, the defendant, City of Hastings, Nebraska was a municipal corporation organized and existing under and by virtue of the laws of the State of Nebraska.

4. That on December 30, 1945, and for a long time prior thereto, the Benevolent and Protective Order of Elks #159, Hastings, Nebraska (hereinafter referred to as the Elks Club) was a local lodge of a national benevolent and fraternal organization, and in the City of Hastings, Nebraska, organized and existing under and by virtue of the charter from the Grand Lodge of the B. P. O. E., located in the City of New York, State of New York; that at said time, it owned and was in possession of property located at the northeast corner of Denver and Fifth Streets, in the City of Hastings, Nebraska, commonly known as 502 North Denver Avenue, and 514 West Fifth Street, which it occupied and used as a public building; that it also owned and possessed the contents of said club building, including all furnishing and fixtures therein.

5. That at all times herein mentioned, the officers, trustees, managers, members, agents, servants and employees of the Elks Club were in the exercise of due care and caution for the safety and protection of the Elks Club property.

6. That on December 30, 1945, and for a long time prior thereto, the defendant was engaged in the business of conducting and operating a certain gas plant in the City of Hastings, Nebraska, and in the business of furnishing to the inhabitants of said City and vicinity natural and artificial gas; that in said business, the

defendant then and there had and controlled divers pipes, tubes, connections and fixtures for the purpose of carrying said natural and artificial gas from its main plant to the divers consumers thereof in the said city and vicinity and by its agents, servants and employees, then and there operated and managed said plant and equipment.

7. That in connection with its business of carrying and transporting natural and artificial gas through the public streets of Hastings, Nebraska, for sale to residents and places of business therein, defendant owned, managed and controlled, among others, a certain pipe line known as the "main line", extending in an easterly and westerly direction under the paved surface of Fifth Street in said city, approximately midway between the curblines of said street; that at a point, towit, 30 feet east of Denver Avenue, there was attached to said main line under Fifth Street, a smaller pipe line known as a "service line" which ran in a general northerly direction under the surface of the ground, at a point approximately 12 inches south of the south foundation wall of the Elks Club building above described; that said service line was opened, managed and controlled by the defendant; that said service pipe was plugged at its northerly terminus and did not enter the Elks Club building, but that the connection by which it was attached to the defendant's main line, herein described, permitted natural and artificial gas to flow from said main line into said service line.

8. That the natural and artificial gas furnished and manufactured by the defendant is a highly inflammable, explosive and volatile gas and that it was then and there the duty of the defendant to use a high degree of care and caution to prevent said gas from escaping from any of its said pipes, fixtures and connections upon the premises and into the building of the Elks Club so that the same might become ignited and destroy or damage the said property.

9. That notwithstanding its duty as aforesaid, defendant did carelessly and negligently permit its said main line and service line to become deteriorated, corroded, rusted and broken, whereby large quantities of natural and artificial gas were permitted to escape on and near the Elks Club premises and to flow under the surface of the ground and into the basement of the Elks Club Building.

10. That the defendant well knew or by reasonable inspection could and should have known the defective condition of its main line and service line, as aforesaid.

11. That as a direct and proximate result of the negligence and careless conduct of the defendant, as aforesaid, a gas explosion was caused to and did occur in the basement of the Elks Club building on, to-wit: December 30, 1945, whereby said building and the contents thereof were greatly damaged, destroyed and wrecked.

12. That on December 30, 1945, there were, in full force and effect, certain policies of fire insurance,

theretofore issued by National-Ben Franklin Fire Insurance Company to the Elks Club, insuring the Elks Club against loss to its building and the contents thereof by fire and explosion; that the Elks Club duly complied with all the terms and provisions of said policies, and thereafter, National-Ben Franklin paid to the Elks Club the total sum of $3,165.32 in full satisfaction of its liability under said policies of insurance for loss and damage as a result of the explosion herein described; that the Elks Club has executed certain Articles of Subrogation whereby it has assigned to National-Ben Franklin all its rights of action, arising out of said explosion, to the extent of said payment; all of which will be duly shown upon the trial of this case, or as the court may direct.

13. That on December 30, 1945, there were, in full force and effect, certain policies of fire insurance, theretofore issued by Milwaukee Mechanics' Insurance Company to the Elks Club, insuring the Elks Club against loss to its building and the contents thereof by fire and explosion; that the Elks Club duly complied with all the terms and provisions of said policies, and thereafter, Milwaukee Mechanics' paid to the Elks Club the total sum of $2,272.41 in full satisfaction of its liability under said policies of insurance for loss and damage as a result of the explosion herein described; that the Elks Club has executed certain Articles of Subrogation whereby it has assigned to Milwaukee Mechanics' all its rights of action, arising out of said explosion, to the extent of said payment, all of which will be duly shown upon the trial of this case, or as the court may direct.

WHEREFORE plaintiff, National-Ben Franklin Fire Insurance Company, a corporation, prays the entry of judgment against the defendant, City of Hastings, Nebraska, a municipal corporation, for the sum of $3,165.-32 and costs of suit and the plaintiff, Milwaukee Mechanics' Insurance Company, a corporation, prays the entry of judgment against the defendant, City of Hastings, Nebraska, a municipal corporation, for the sum of $2,272,41 and costs of suit.

NATIONAL-BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, and

MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Plaintiffs

By /s/ Blackledge & Conway
Their Attorneys

STATE OF NEBRASKA)
)ss.
COUNTY OF ADAMS)

Fred R. Irons, being first duly sworn, deposes and says that the plaintiffs above named are both corporations and that he is one of the attorneys for the same and he knows the contents of the foregoing petition and that the facts stated therein are true as he verily believes.

/s/ Fred R. Irons

Subscribed to and sworn to in my presence this 20 day of August, 1947.

/s/ Isa Bruckman
Notary Public

Isa Bruckman
Notarial
SEAL
Commission Expires
Mar 23, 1950
Adams County, Nebraska

Filed Aug. 20, 1947
Verner W. Felker
Clerk of the District Court
Adams County
Nebraska

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

AMENDED ANSWER OF DEFENDANT

No. 12624

NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, et al, Plaintiffs

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant

Comes now City of Hastings, Nebraska, the defendant herein, and for its answer to the petition of the plaintiff alleges:

1.

That it admits each of the facts alleged in Paragraphs 1, 2, 3 and 4 of said petition.

2.

That it denies each and every allegation contained in the petition of the plaintiff not herein specifically admitted to be true.

3.

That any damage to the building of Benevolent and Protective Order of Elks, No. 159, Hastings, Nebraska (hereinafter referred to as the Lodge), on or about the 30th day of December, 1945, was not due to any negligence on the part of the defendant, but was the result of the negligence of the Lodge directly contributing thereto in each of the following respects:

(a) It permitted a service line, connected to the gas main in Fifth Street and running north therefrom across and under its premises located immediately north of Fifth Street, to remain in the ground owned and controlled by it, and failed to remove the same after its building was built upon said premises.

(b) It permitted the northern terminus of said service line upon its premises to be and remain improperly closed or plugged.

(c) It failed to notify the defendant of the location and condition of the part of said service line located in the ground owned and controlled by it.

(d) In 1945, about two or three months preceding December 30, 1945, it caused a part of the ground owned by the defendant and dedicated to the public for use as a public street, and particularly the part

thereof located immediately south of the premises of the Lodge, to be covered with a concrete apron thereby rendering it impossible for the defendant to inspect or repair any part of said service line located below the surface of said apron, and said construction was done and performed without the knowledge, consent or authority of the defendant.

(e) By constructing the concrete apron as aforesaid, it sealed the ground around its building thereby rendering it impossible for any escaping gas to rise to the surface of the ground.

(f) In the construction of said concrete apron it failed to secure permission for said construction from the Mayor and Council of the City of Hastings, and it failed to furnish any bond, and thereby violated Chapter 4, Article I (e) Sec. 4 of the Municipal Code of the City of Hastings, Nebraska, which provided:

> "(It shall be and is hereby declared unlawful for any persson or persons to construct or cause to be constructed in said City of Hastings, any driveway or apron over the curb and corner of the streets and avenues of the City of Hastings without specific permission from the Mayor and Council. Before any such permit shall be issued, the applicant to whom said permit is to be issued shall furnish good and sufficient bond in the sum of $1000.00 to be approved by the Mayor to secure the City against any damages that may arise or accident that may be incident to such apron constructed. * * *")

4.

That any break or defect in the aforesaid service line was caused by the carelessness and negligence of the

Lodge, its agents, servants, employees and by contractors employed by it incident to the grading for the concrete apron constructed south of the premises of the Lodge as aforesaid.

WHEREFORE, the defendant prays that the petition of the plaintiffs herein be dismissed and that the defendant go hence without day and recover its costs.

CITY OF HASTINGS, NEBRASKA,

By /s/ J. E. Ray,
Its Attorney.

STATE OF NEBRASKA)
)ss.
ADAMS COUNTY)

J. E. Ray, being first duly sworn on oath deposes and says that he is the duly qualified and acting City Attorney for the City of Hastings, Nebraska, defendant herein; that he has read the foregoing answer, knows the contents thereof, and the allegations therein contained are true as he believes.

/s/ J. E. Ray

Subscribed and sworn to before me this 5th day of February, 1949.

/s/ Verner W. Felker
Clerk of District Court

District Court
Official
SEAL
Adams County, Nebraska

Filed Feb. 7, 1949
Verner W. Felker, Clerk of
District Court
Adams County, Nebraska

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

Journal Entry

NATIONAL - BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Subrogees of the Benevolent and Protective Order of Elks, Hastings, Nebraska, Plaintiffs,

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant

Note: The following is a copy of the last two paragraphs of Journal Entry filed in the office of the Clerk of the District Court, Adams County, Nebraska, on February 25, 1949:

"Now on this 10th day of February, 1949, pursuant to the recess heretofore taken in the trial of said case, the parties being present by their counsel, trial proceeds, and the plaintiffs continue to adduce their evidence, and at 10:35 A.M. the plaintiffs rest. The defendant, by its counsel, moves for a directed verdict, and said motion is considered by the court, and argument is made with respect thereto by counsel for each of the parties, and in consideration thereof and of the pleadings and evidence herein, the court finds that said motion should be sustained.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT:

That the motion of the defendant for an order directing the jury to return a verdict in favor of the defendant and against the plaintiff should be and the same is hereby sustained; that the action of the plaintiffs should be, and it is hereby dismissed, and the costs are taxed to the plaintiffs and the Jury discharged, to all of which the plaintiffs except.

/s/ EDMUND NUSS
Judge.

O. K. Form—JDC

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

JOURNAL ENTRY #12624.

NATIONAL-BEN FRANKLLIN FIRE INSURANCE COMPANY, A Corporation, and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corportion, PLAINTIFFS,

V.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, DEFENDANT.

Now on this 25th day of February, 1949, it being one of the days of a regular term of this court, this case came on to be heard upon the motion of the plaintiff for a new trial of said case and was submitted to the court, and the Court being fully advised, finds that said motion and each part thereof should be overruled and denied.

It is Therefore Considered and Ordered by the Court:

That the motion of the defendant for a New Trial herein should be, and the same is hereby overruled and denied.

/s/ EDMUND NUSS
Judge.

O. K. Form—/s/ Blackledge & Conway-Irons.

Filed Feb. 25, 1949
Verner W. Felker
Clerk of District Court
Adams County, Nebraska.

STATE OF NEBRASKA,)
Adams County,) ss.

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT, ADAMS COUNTY, NEBRASKA.

I, Verner W. Felker, Clerk of the District Court, in and for said County, do hereby certify that I have compared the foregoing copy of PETITION; AMENDED ANSWER OF DEFENDANT; PART OF JOURNAL ENTRY OF FEB. 10, 1949 and JOURNAL ENTRY OF FEBRUARY 25, 1949, in Case No. 12624 - Doc. 43 - Page 224 - NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Plaintiffs Vs. CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant.

with the original record thereof, now remaining in said court; that the same is a correct transcript thereof,

and of the whole of said original record; and that I have the legal custody and control of said original record; that said court is a court of record, has a seal, and that said seal is hereto affixed; and that the foregoing attestation is in due form, according to the laws of the State of Nebraska.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 12th day of November A. D., 1949.

(Seal) Signed Verner W. Felker

VERNER W. FELKER,
Clerk of the District Court.

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

REMARKS OF THE COURT.

Case No. 12624

NATIONAL BEN FRANKLIN FIRE INS. CO., ET AL, PLAINTIFFS,

V.

CITY OF HASTINGS, NEBRASKA, DEFENDANT.

Before His Honor, Judge Edmund Nuss and Jury, Hastings, Nebraska, February 8-9, 1949.

Appearances:

BLACKLEDGE, CONWAY & IRONS,
Attorneys for Plaintiffs.

STINER & BOSLAUGH,
J. E. RAY,
Attorneys for Defendant.

MR. CONWAY:- That's all we have, Your Honor. Plaintiffs rest.

MR. STINER:- Comes now the defendant at the close of the plaintiffs' case in chief and moves the Court to direct the jury to return a verdict in favor of the defendant for the reason the evidence offered by the plaintiffs is not sufficient to sustain any judgment of the plaintiffs against the defendant. I would like to be heard on this, Your Honor.

THE COURT:- Very well. The jury may retire to the jury room until called. (Jury retires). Proceed.

(Argument had).

THE COURT:- Call in the jury. (Done). Ladies and gentlemen of the jury: At this stage of a trial it frequently happens that the defendant makes what is known as a motion for a directed verdict. That means, substantially, that the evidence in the case, given its most favorable inference on behalf of the plaintiffs, is not enough to go to the jury.

Under the law, if there is a complete lack of evidence, or if the evidence, legally considered, is not sufficient upon which a jury could bring in a verdict, then it bcoms the duty of the Court to determine and decide the case.

In this case the plaintiffs sue the defendant on the ground of negligence. That means that the plaintiffs must prove that the defendant did something that an ordinarily prudent man would not have done, or failed to do something that an ordinarily prudent man would have done under the circumstances, which negligence caused damage to the plaintiffs.

It appears without question that the carrier of the insurance on the Elks Club after the explosion paid the damage to the Elks Club and received therefrom a subrogation right and under that they have a perfect right to bring an action to recover on the same basis the Elks Club might have recovered, but they are limited to the basis on which the Club might have proceeded. In other words, their rights are neither greater nor less than the rights of the Club would have been.

In this case there is no evidence whatever of negligence on the part of the city in maintaining its gas liness or permitting gas to escape. It is reasonably clear that the mere fact that the explosion was caused by a defective gas line of the city would not of itself be sufficient grounds to take the case to the jury. There must be a showing of negligence on the part of the defendant. The evidence must show a situation that the defendant did something that an ordinarily prudent person would not have done, or, that the defendant failed to do something that an ordinarily prudent person would have done.

It is claimed that the city did not properly construct the gas lines and permitted the gas to leak. There is no evidence of any improper construction which might have been disclosed, and the reasonable inference would, in fact, disclose no such situation here. The evidence indicates that the break must have existed for some time, yet there was no complaint of the smell of gas by anyone in the vicinity before the explosion occurred. This break did not affect the pressure of the gas in the house just east of the Elks Club which received its supply from this particular line.

There is no actual negligence here and no negligence which might be inferred from the circumstances. No evidence to connect the city with the actual breaking of the pipe and no evidence as to how long it had been broken. But no notice of any leaky condition there was ever given to the city, nor was it a situation whereby the city should have known there was a break in the line. No evidence that anyone smelled gas at the Elks Club that night. No evidence there was a smell of gas just before the explosion.

As I see it there is nothing for the Court to do but to direct a verdict in favor of the defendant and that will be done.

CERTIFICATE.

State of Nebraska,)
) ss.
10th Judicial District.)

I, Lee W. Johnston, one of the official court reporters within and for said district and state, do hereby certify that I reported the trial of the above entitled case and that the foregoing Remarks of the Court is a true and correct transcript of that portion of the proceedings as fully appears from my shorthand notes made and taken at the time.

In testimony whereof I have hereunto set my hand at Red Cloud in said district and state this 12th day of November, 1949.

Signed Lee W. Johnston
Reporter.

Fee $2.50.